No. 87-5277-CFH
Status: GRANTED
CAPITAL CASE

Title: Tony B. Amadeo, Petitioner
v.
Ralph Kemp, Warden

Docketed:
August 10, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Singleton,Palmer, Bright,Stephen B.

Counsel for respondent: Boleyn,Susan V.

NOTE* CAPITAL CASE

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1987	P	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 24 1987		Brief of respondent Kemp, Warden in opposition filed.
4	Sep 30 1987		DISTRIBUTED. October 16, 1987
6	Oct 19 1987		Petition GRANTED.
			**********
8	Nov 19 1987		Order extending time to file brief of petitioner on the merits until December 14, 1987.
9	Dec 10 1987		Joint appendix filed.
10	Dec 14 1987		Brief of petitioner Tony B. Amadeo filed.
12	Dec 14 1987		Brief amicus curiae of NAACP Legal Defense and Educ. Fund filed.
11	Dec 16 1987		Record filed.
		*	Certified original record, 6 volumes, received.
14	Jan 13 1988		Order extending time to file brief of respondent on the merits until January 25, 1988.
15	Jan 25 1988		Order further extending time to file brief of respondent on the merits until January 29, 1988.
16	Jan 29 1988		Brief of respondent Kemp, Warden filed.
18	Feb 5 1988		SET FOR ARGUMENT, Monday, March 28, 1988. (4th case).
17	Feb 8 1988		CIRCULATED.
19	Feb 22 1988		DISTRIBUTTED. February 26, 1988. (Motion of petitioner for extension of time to file a reply brief).
20	Feb 22 1988		REDISTRIBUTED. February 26, 1988
21	Feb 22 1988	D	Motion of petitioner for an extension of time to file a reply brief filed.
22	Feb 29 1988		Motion of petitioner for an extension of time to file a reply brief DENIED.
24	Mar 28 1988		ARGUED.

EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-5277

TONY B. AMADEO,

Petitioner,

-vs-

RALPH KEMP, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the prosecutor intentionally discriminates based on race, gender and age in constructing grand and petit jury pools, and deliberately obscures prima facie evidence of discrimination resulting in the underrepresentation of blacks, women and young people, is a federal court barred from considering the merits of a post-conviction claim due to trial counsels' unknowing failure to object to the pool?

2. If the prosecutor's concealment of his attempt to manipulate grand and petit jury composition does not provide cause under Wainwright v. Sykes in a non-capital case, does the heightened reliability required by the Eighth Amendment provide a different standard of review such that a federal court should reach the merits of the claim despite trial counsel's failure to contemporaneously object to the prosecutor's covert exclusion of blacks, women and young people from the jury pool?

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OPINIONS BELOW

The decision of the Court of Appeals reversing the District Court's grant of habeas corpus relief is published. Amadeo v. Kemp, 816 F.2d 1502 (11th Cir. 1987). Both the majority and dissenting opinions are included in the Appendix at Tab i. The prior decision of the Court of Appeals vacating the District Court's earlier grant of habeas corpus relief is also published. Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985). The opinion of the state supreme court affirming petitioner's convictions and sentence of death on direct appeal appears at Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979).

JURISDICTIONAL STATEMENT

Petitioner, Tony B. Amadeo, was convicted and sentenced to death in Georgia. The United States District Court for the Middle District of Georgia, Owens, J. presiding, has twice ruled that Mr. Amadeo's convictions and sentence of death were obtained in violation of the constitution because, inter alia, they were the direct result of underrepresentation and the prosecutor's manipulation of the grand and petit jury pool with respect to blacks, women or young people.

The Court of Appeals reversed the District Court on April 30, 1987. The Court of Appeals denied Mr. Amadeo's petition for rehearing on June 8, 1987. Accordingly, Mr. Amadeo petitions this Court for a writ of certiorari to review the decision of the Court of Appeals. The jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS UPON WHICH THE PETITION IS BASED

This petition turns on the Court of Appeals' interpretation of 28 U.S.C. §2254, and more specifically the court's reliance on the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), to hold that petitioner's claim based on the prosecutor's deliberate and surreptitious manipulation of the grand and petit jury composition is procedurally barred. The gravamen of Mr. Amadeo's claim, and the basis for the District Court's ruling that his convic-

tions and death sentence were obtained in violation of the constitution, involves the equal protection clause of the Fourteenth Amendment and the Sixth and Fourteenth Amendment requirement that jury pools reflect a fair cross section of the community. More specifically, Mr. Amadeo argued, and the District Court found, that the prosecutor's directions to the county jury commissioners to limit the number of blacks, women and young people called for grand and petit jury service, but to exclude them in a way that did not create prima facie evidence of discrimination, was unconstitutional. The constitutional and statutory provisions upon which the petition is based are included in the Appendix at Tab v-b.

STATEMENT OF THE CASE

Tony B. Amadeo was indicted and tried for armed robbery and murder in the Superior Court of Putnam County, Georgia. At no point did Mr. Amadeo's trial counsel challenge the pool from which the grand or petit juryies were selected. Mr. Amadeo was convicted of both offenses and sentenced to death on November 30, 1977.

Mr. Amadeo appealed his convictions and sentence to the Georgia Supreme Court. While the appeal was pending, discovery pertaining to an unrelated voter registration suit disclosed that the prosecutor in Mr. Amadeo's case had deliberately set about to compile the master jury list to exclude representative numbers of blacks, women and young people, and limit their participation in a way that would not be legally cognizable. Bailey v.Vining, Civ. No. 76-199-Mac (M.D. Ga. Aug. 17, 1978), Appendix at Tab ii-b; 2d Supp. Record, Vol. I at 44.*

* Record citations refer to the record before the Court of Appeals. It is important to note that neither the parties nor the courts-below disputed the purpose or essential features of the prosecutor's scheme to subvert constitutionally acceptable jury selection procedures in Putnam County. See 2d Supp. Record, Vol. I at 67 (state concedes that jury lists were manipulated and that such covert tampering with jury composition did prejudice Mr. Amadeo); November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1-2; Appendix at Tab ii-a (finding that there is no disagreement as to the facts, that memorandum by prosecutor directing that jury lists be drawn based on race and gender found to exist and that the memo-
[footnote continued]

Documents uncovered in the unrelated proceeding established that the prosecutor had sent the county jury commissioners a memorandum telling them to fix the number of blacks, women and young people in the master list at a percentage significantly lower than the percentage in the population, but not low enough to warrant a composition challenge. See Undated, unsigned prosecutor's memorandum, Appendix at Tab iv-a.

The undisclosed memorandum told the commissioners to fix the percentage of blacks in the grand and petit jury lists at levels of approximately 11% and 5%, respectively, less than the percentage of blacks in Putnam County. Id. The memo also instructed the commissioners to devise similar underrepresentations for women. Id.; Bailey v.Vining, supra.

The purpose of the scheme was thus to achieve underrepresentation of groups that the prosecutor deemed undesirable, but to do so in a way that would avoid detection. The scheme worked in the present case, as lawyers for Tony Amadeo were not aware of the prosecutor's surreptitious manipulation of the venires until after the case was on direct appeal. 2d Supp. Record Vol. I at 14-15, 26-28. The state conceded that this covert tampering with the master lists did take place, and that it was prejudicial to Mr. Amadeo. 2d Supp. Record, Vol. 1 at 67. November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1-2; Appendix at Tab ii-a.

The prosecutor's tampering was by design and by effect a concealed and covert scheme. First, its very function was to avoid detection. That is, the prosecutor ordered that the numbers be fixed at levels that were clearly underrepresentative of blacks and women, and yet were not so low that even wary defense

footnote continued]
randum demonstrates "intense discrimination on the part of . . . governmental officials. . ."); 816 F.2d at 1507 (majority opinion of the Court of Appeals does not dispute character and effect of prosecutor's scheme, but does find issue procedurally barred); 816 F.2d at 1509 (Clark, J. dissenting, characterizes prosecutor's memorandum as the "smoking gun" that unequivocally establishes unconstitutional discrimination in the selection of jurors).

counsel would suspect either a prima facie disparity or foul play. Record, Vol. I at 147. See, Amadeo v. Kemp, 816 F.2d at 1509 (11 th Cir. 1987) (Clark, J. dissenting).

Second, the memorandum was not made a part of or connected to the current master list, which is the list from which Tony Amadeo's jury venire was drawn. Instead, it was placed somewhere in a stack of old master lists dating back to 1950, apart from the existing master list. 2d Supp. Record Vol. I at 41, 50; 816 F.2d at 1506-07.

After evidence of the prosecutor's illegal scheme came to light in the Bailey case, it was made available to Mr. Amadeo's appellate counsel. When the prosecutor's surreptitious scheme was disclosed to trial counsel, they agreed that had they known about the covert discrimination against blacks, women and young people, they would have challenged the composition of the venires. 2d Supp. Record Vol. I at 58, 62. Mr. Amadeo also testified that he was not made aware of the manipulation of the jury pool and would have challenged it. November 15, 1985 Hearing Transcript Before the District Court; Appendix at Tab iv.

Mr. Amadeo's attorneys moved to supplement his direct appeal. However, the state supreme court refused to reach the merits of the issue and affirmed Mr. Amadeo's convictions and sentence. Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979). This Court denied certiorari. Amadeo v. State, 444 U.S. 974 (1979).

Counsel for Mr. Amadeo again challenged, inter alia, the legality of the prosecutor's scheme in a petition for state post-conviction relief. The issue was raised before the Superior Court of Putnam County, but relief was denied on February 29, 1980. The state supreme court declined review on September 10, 1980. An unrelated state post-conviction action was then filed in Butts County Georgia. It was dismissed and the Georgia Supreme Court declined review.

Having exhausted his state remedies, Mr. Amadeo then sought

federal habeas corpus relief in the United States District Court for the Middle District of Georgia, Owens, J. presiding. Among other issues, Mr. Amadeo claimed that the deliberate effort by the prosecutor to limit the participation of blacks, women and young people on the grand and petit juries rendered his convictions and death sentence unconstitutional. On May 17, 1984, District Court held, inter alia, that the prosecutor had deliberately excluded protected groups from the jury selection process, thereby violating Mr. Amadeo's constitutional rights. On September 27, 1985 the Court of Appeals, however, reversed the grant of the writ and directed the District Court to conduct an evidentiary hearing on the issue of trial counsels' failure to challenge the grand and petit jury pool and whether there was cause to excuse the apparent procedural default. Appendix at Tab i-c.

Following an evidentiary hearing, the District Court found that "view[ed] in its totality, this was a case of intense discrimination on the part of your governmental officials in this County." November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1; Appendix at Tab ii-a. The court further found that "the composition of the [jury] box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,' and they did it. . . . [W]e all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed." Id. at 3.

The District Court expressly found that the issue was not procedurally barred. The court noted that it was reasonable for Mr. Amadeo's trial counsel to not challenge the composition of the grand and petit jury pool. Id. at 4. The court found that trial counsel did not know about the prosecutor's illicit scheme and that counsel did not deliberately bypass state procedures by failing to object to the jury arrays. Id. at 4-5. The court

ultimately ruled that the attorneys' ignorance --predicated as it was on the official misdeeds of the county prosecutor-- provided cause to excuse their failure to challenge the composition of the grand or petit jurys, and therefore the merits of the issue should be reached under Wainwright v. Sykes. Id. at 4-5.

A majority of the panel for the Eleventh Circuit Court of Appeals, however, disagreed with the findings and conclusion of the District Court. While the panel majority did not find that trial counsel had made a deliberate or tactical decision to forego a challenge to the jury based on the prosecutor's intentional subversion of representative arrays, the majority did find that defense counsel had elected to forego a jury challenge based on the racial composition of the venire per se, and because of that decision failed to discover the prosecutor's memorandum. 816 F.2d at 1507-08. Consequently, according to the majority, there was not cause to explain trial counsels' failure to litigate the jury issue and the District Court should not have reached the merits of the issue. Id. According to the dissent, the majority's analysis missed the mark and transformed default doctrine in a way that rewards the state for its own wrongdoing. 816 F.2d at 1508.

REASONS COMPELLING REVIEW

I.

WHERE THE PROSECUTOR BRINGS ABOUT THE UNDERREPRESENTATION OF BLACKS, WOMEN AND YOUNG PEOPLE ON GRAND AND PETIT JURY POOLS, AND HE DOES SO IN A WAY THAT DELIBERATELY OBSCURES PRIMA FACIE EVIDENCE OF DISCRIMINATION, CAUSE EXISTS TO REACH THE MERITS OF A POST-CONVICTION CLAIM DESPITE TRIAL COUNSELS' UNKNOWING FAILURE TO OBJECT.

When Tony Amadeo was indicted for capital murder, blacks comprised 31.4 percent of the box from which the grand jurors were chosen. Vol. I at 147. At the point Mr. Amadeo's trial lawyers selected a jury that would determine his guilt or innocence, and ultimately whether he should live or die, blacks made up 37 percent of the petit box. Id.

Thus, although the race composition of jury venires did not reflect the overall racial composition of the rural Georgia county

in which Mr. Amadeo was prosecuted, the disparities were not legally significant. Blacks were underrepresented on the grand and petit jury lists by 10.7 and 5.1 percent, respectively. Id.

Based on the apparent composition of the jury venires, a reasonable attorney would not have cause to challenge the manner in which jurors were selected. See Swain v. Alabama, 380 U.S. 202, 208-09 (1964) (10% underrepresentation in petit jury venires insufficient to establish prima facie evidence of discrimination); Preston v. Mandeville, 428 F.2d 1392, 1393 (5th Cir. 1970) (14.3% disparity constitutes prima facie evidence of discrimination). Little wonder, therefore, that Mr. Amadeo's trial counsel did not move to dismiss the indictment or object to the pool from which they selected a capital trial jury.

What neither counsel nor petitioner knew was that both the grand and petit jurors were selected via what a federal district court judge would later characterize as a process defined by systematic and intense race discrimination. November 14, 1985 Order of the District Court at 1; Petitioner's Appendix at Tab ii-a. Nor could counsel or petitioner have been aware of the unconstitutional manner in which the jury list had been compiled. That is so because, as subsequently found by the District Court, the discrimination was due to a covert scheme implemented by the county prosecutor. The prosecutor directed the jury commissioners to limit the participation of blacks, women and young people so that they were not equally represented on list, but to do so in a way that would not be legally cognizable. November 14, 1985 Order of the District Court at 3-5; Appendix at Tab ii-a. The prosecutor directed the commissioner to compile jury lists based on race, gender and age, but to select just enough people from each group so that prima facie evidence of discrimination would not exist. Id.

Despite the prosecutor's reprehensible and clear-cut violation of criminal defendants' constitutional rights to equal protection and a fair and impartial jury based on a representative

cross-section of the community, the Court of Appeals nevertheless held that the District Court acted improperly when it ruled that the wrong done to Mr. Amadeo could only be remedied through the conditional grant of a writ of habeas corpus. According to a majority of the Court of Appeals, despite the manner in which the prosecutor had covertly manipulated who would and who would not serve on grand and petit juryies based on race, gender and age, habeas corpus relief was inappropriate due to Mr. Amadeo's trial counsels' failure to object to the composition of the grand or petit juries. As noted by the dissent, however, "[s]uch a result rewards the state for its underhandedness and stretches the doctrine of Wainwright v. Sykes, beyond recognition." Amadeo v. Kemp, 816 F.2d 1502, 1508 (11th Cir. 1987) (Clark, J. dissenting).

A. Contrary to the Result Below, Cause Exists to Reach the Merits of a Claim Where State Action Results in the Deliberate Concealment of Evidence of Unconstitutional Conduct and Interfers with Compliance with State Procedural Requirements By Misrepresenting the Manner in Which Jury Venires Were Compiled.

The result below cannot be squared with the principles and precedent articulated by this Court or any sound and rational application of default doctrine. Under the doctrine of Wainwright v. Sykes, 438 U.S. 72 (1977), a defendant can establish cause for his trial counsel's failure to properly preserve an issue under state procedural rules in at least two circumstances. First, where the legal basis of a claim is unavailable because it is novel, cause may be established. Reed v. Ross, 468 U.S. ___, 83 L.Ed.2d 1 (1984). Second, where a defendant can show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," such as "a showing that the factual or legal basis for a claim was not reasonably available to counsel... or that 'some interference by officials'... made compliance impracticable," then this "would constitute cause under this [Wainwright] standard." Murray v. Carrier; 91 L.Ed.2d 397; 106 S.Ct. 2639 (1986), quoting Brown v. Allen, 344 U.S. 443, 486 (1953). See

Reed v. Ross, 468 U.S. at 14 (1984). Each of the various factors listed in Murray as sufficient to establish cause is directly applicable to this case. Each was ignored by the majority decision below.

Tony Amadeo's lawyers were not aware of the prosecutor's intentional jury discrimination at the time of trial. This was the purpose and effect of the covert scheme. Furthermore, evidence that the prosecutor ordered jury lists selected based on race, sex and age, and at the same time tried to conceal his effort by manipulating the jury list so that jury composition appeared legally unassailable, was unavailable until the prosecutor's memorandum to the jury commissioner was found. That document was kept apart from the current master jury list and was discovered in the course of an unrelated voter registration suit. 2d Supp. Record Vol. I at 41, 50.

Thus this is a case where the issue on which the state claims default is one that was "reasonably unknown" to counsel at the time of trial. Reed v. Ross, 468 U.S. 1, 14 (1984) (the "failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [Wainwright] requirement is met."); Murray v. Carrier, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986) (same). Under Reed and Murray, cause is thereby established, and contrary to the result below, trial counsels' failure to challenge the grand or petit jury arrays does not bar a federal court from reaching the merits of Mr. Amadeo's claims.

Furthermore, the failure to discover the issue in this case was due completely to "'interference by officials'" in the Putnam County prosecutor's office. Murray v. Carrier, 106 S.Ct. at 2646. In fact, in this case the "interference" amounted to intentional concealment by the state prosecutor's office. Once again, therefore, cause is established and the inquiry should turn to a consideration of the merits of the issue.

Finally, the result below is at odds with the policy and principles that led this Court to embrace default doctrine. As

recognized by this Court, it is necessary to protect state procedural requirements and trial level contemporaneous objection rules for several reasons. Wainwright v. Sykes, 433 U.S. at 89-90. First, to prevent "sandbagging" and the withholding of claims from the trial court so that they might be used on appeal. Second, to maintain the perspective that the trial, and not appellate or post-conviction proceedings, is the "main event" in a criminal prosecution. Id. at 90. Finally, federalism requires that an equitable balance be struck between the duty to enforce constitutional rights and the procedural needs of a subordinate, but largely autonomous, state court system. Id.

None of these interests, however, would be furthered by a concept of cause that does not extend to a situation where the state deliberately conceals evidence of unconstitutional conduct and impedes the orderly adjudication of constitutional rights by masking the realities of its own practices. Surely, where the defense is unaware of discriminatory practices, those practices cannot be turned into issues to be withheld and subsequently used to secure appellate relief. Nor would their subsequent litigation in any way detract from the primacy of the trial. Indeed, litigation would add to such primacy by ensuring that lynchpin of trial process --the jury-- was fairly selected without resort to pernicious and unlawful methods or considerations.

Finally, it is precisely the equitable character of habeas corpus relief, see Kuhlman v. Wilson, ___ U.S. ___, 106 S.Ct. 2616, 91 L.Ed.2d 364, 377 (1986) (plurality opinion); Wainwright v. Sykes, 433 U.S. at 90-91; Fay v. Noia, 372 U.S. 391, 438 (1963), that above all else requires that cause for apparent procedural defaults be recognized where, as here, an issue is not timely litigated due to government deception and covert interference with the exercise of constitutional rights. As noted by the dissent below, it would be indeed ironic if a doctrine rooted in equity and comity were turned on its head and used to shield the deliberate subversion of pivotal constitutional principles.

Instead, as called for by the dissent, "[w]here the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." 816 F.2d at 1513.

B. Review Is Necessary to Resolve the Conflict Between the Decision Below and the Tests for Cause Employed By Other Federal and State Courts of Appeals.

The result below is in conflict with procedural default doctrine as developed by other federal and state courts of appeals. Other courts have clearly recognized that where the failure to timely litigate a constitutional issue is due to prosecutorial misrepresentations, the state is estopped from asserting a procedural bar. For example in Freeman v. Georgia, 599 F.2d 65 (5th cir. 1979), the prosecution misled trial counsel concerning the nature of missing witnesses' potential testimony. The court of appeals ruled that due to the misrepresentation, the state could not claim that habeas corpus relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963) was barred due to defense counsel's failure to exercise due diligence in making independent efforts to locate the witnesses. Id..

Similarly, state courts have also recognized that where a constitutional violation is inseparable from state efforts to conceal misconduct, the issue is not defaulted because the defendant was unable to raise it contemporaneously in accord with state procedural rules. Thus, in Smith v. Zant, 250 Ga. 684, 307 S.E.2d 37 (1983), the prosecution introduced evidence and argued to the jury that the testimony of an accessory-informant was not influenced by any deals or offers. Following his direct appeal and initial state post-conviction action the defendant learned that prior to trial the witness had been told that he would be prosecuted on a capital charge unless he implicated the defendant.

The state argued that the merits of the Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360

U.S. 264 (1958) claim need not be reached. With due diligence, according to the state, the defense could have independently discovered and established that the witness had in fact been influenced by an offer of partial immunity. Therefore, the claim had been waived.

The state supreme court soundly rejected any such extension of default doctrine. Smith v. Zant, 250 Ga. 684, 307 S.E.2d 37. Instead the court held that the concealment of evidence by the prosecution provided cause obviating the defendant's otherwise untimely litigation of the claim.

Other appellate courts have found cause to reach the merits of an issue despite a procedural default where a constitutional violation is deliberate. Thus, in Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986), the court articulated a rule that where "the state's conduct so blatantly violated the rule laid down in Edwards [v. Arizona]... it satisfied the cause and prejudice standard of Wainwright." Id. at 1236 n. 2. citing Engle v.Isaac, 456 U.S. 107, 135 (1982). Hence, the intentional violation of constitutional rights alone, even where that violation does not entail the suppression of evidence material to the claim, provides cause to excuse procedural noncompliance.

In marked contrast with the precedent of this and other courts, the court-below ruled that Mr. Amadeo's trial counsels' failure to object to the grand or petit jury arrays prior to trial barred relief based on the prosecutor's covert manipulation of the racial, gender and age composition of the venires. This is so even though the prosecutor set out to mislead defense counsel so that the composition of the venires would not be challenged. The lower court's radical extension of default doctrine requires this Court's review so that it may be harmonized with decisions and principles governing default doctrine.

II.

WHERE THE PROSECUTOR SURREPTITIOUSLY MANIPULATES THE COMPOSITION OF THE JURY IN A CAPITAL CASE, THE HEIGHTENED RELIABILITY REQUIRED BY THE EIGHTH AMENDMENT PROVIDES CAUSE TO REACH THE MERITS OF THE CLAIM EVEN THOUGH TRIAL COUNSEL DID NOT OBJECT TO THE VENIRES AT TRIAL.

It is beyond dispute that the irrevocable character of a death sentence carries "a correspondingly greater degree of scrutiny of the capital sentencing determination." Turner v. Murray, ___ U.S. ___, 90 L.Ed.2d 27 36 (1986), quoting, California v. Ramos, 463 U.S. 992, 998-99 (1983). See also Caldwell, v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (O'Connor, J. concurring); Eddings v. Oklahoma, 455 U.S. 155 (1982); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976). It is also established that because of the unique and pivotal role of the jury in capital decision-making, Caldwell, supra; Turner, supra, the Eighth Amendment requirement of heightened reliability directly affects matters pertaining to jury selection.

For example, with respect to voir dire, this Court has long recognized that absent "special circumstances" the constitution does not require that prospective jurors be examined concerning race. Ristaino v. Ross, 424 U.S. 589 (1976). Where the prosecution is based on an interracial offense, however, in a capital case this Court has held that race is a special circumstance, per se. Turner v. Murray, 90 L.Ed.2d at 37. Moreover, in such a case if the trial court prevents voir dire on the issue of race there is an "unacceptable risk of racial prejudice infecting the capital sentencing proceeding." Id. at 37. Without the rule recognized in Turner this Court was afraid that a jury would be unable to "make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" Id. at 35 (citations omitted).

In the case at bar, Mr. Amadeo's right to a fair and impartial jury was affected by conduct far more pernicious than in Turner. The same, if not greater, risk exists that jurors selected in part based on invidious concerns --race,

gender and age-- would not fully be able to properly deliberate whether petitioner should live or die.

As in Turner, this Court should consider and recognize the necessity of procedural safeguards that ensure the reliability of capital proceedings. This Court should therefore review the decision below to determine whether the constitutional requirements of a capital proceeding carry a special test for cause that is satisfied where as here the prosecution knowingly and surreptitiously subverts rights associated with the integrity and reliability of the proceedings.

CONCLUSION

The prosecutor in the case at bar deliberately and surreptitiously set out to undermine critical constitutional rights. He expressly instructed the county jury commissioners to compile jury lists based on race, gender and age, but to include sufficient numbers of each group so as to not trigger a judicial challenge. By design the prosecutor's effort included the attempt to make a blatantly unconstitutional practice appear constitutional.

Yet because the prosecutor's scheme succeeded, and the venires did not appear to be facially invalid, defense counsel failed to object until the prosecutor's actions were uncovered well after petitioner was tried and sentenced to death. As such, this Court ought to review the decision of the majority below, with its misplaced reliance on procedural default doctrine to overturn the District Court's proper grant of relief. The petition should be granted so that the result below may be harmonized with the principles and precedent of this and other courts.

Respectfully submitted,

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counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600–01. *See also Straight v. Wainwright*, 772 F.2d 674, 677–78 (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

CLARK, Circuit Judge, dissenting:

This case involves a scheme by the county solicitor's office and the county jury commission to limit the number of blacks on grand and petit jury lists in Putnam County, Georgia. The scheme included a coverup intended to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in the prevailing case law. The majority holds that a defendant who did not learn of the underlying scheme until after his trial is barred from raising that claim in federal court because of procedural default. Such a result rewards the state for its underhandedness and stretches the doctrine of *Wainwright v. Sykes* beyond recognition. Accordingly, I dissent.

I. FACTS

We remanded this case to the district court for a hearing to determine whether "the defects in the jury composition were ... reasonably discoverable by [Amadeo's] counsel and [whether] the decision not to challenge the composition was ... a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d 1141, 1145 (11th Cir.1985). After holding such a hearing, the district court found that petitioner had demonstrated sufficient "cause" for his failure to object at trial to the composition of the master jury list. Although the majority does not explicitly state the standard of review employed in this case, I assume the factual findings underlying the district court's legal ruling are accepted as true unless they are clearly erroneous.

At the evidentiary hearing, the state conceded that the county intentionally discriminated against blacks in the selection of prospective jurors and that the prejudice prong of *Wainwright v. Sykes* was established. 2d Supp. Record, Vol. I at 67. The undisputed evidence of this discrimination was first presented in *Bailey v. Vining*, No. CIV 76–199–MAC (M.D.Ga. Aug. 17, 1978). In *Bailey*, a civil case, plaintiffs challenged Putnam County's voter registration and juror selection procedures. Judge Owens, the district judge in the instant case, was also the judge in *Bailey*. As a result of *Bailey*, the county was required to revise its juror selection procedures. The following version of the pre–1978 jury selection procedures in Putnam County is uncontroverted.

1. *The Discriminatory Scheme.*

Prior to Amadeo's indictment, the Putnam County Solicitor's (now the District Attorney's) Office advised the county jury commission to recompile the grand and petit jury lists in a manner that would under-represent blacks by a percentage just small enough to avoid challenges based solely on statistical evidence. Specifically, a memorandum from the prosecutor's office advised the commission to place the names of 101 blacks in the grand jury pool and 298 blacks in the petit jury pool. Petitioner's Exhibit 4.[1] Such racial precision was possible because the master jury list was drawn from voter registration cards which were kept in two separate groups, one for blacks and one for whites. The memorandum indicated that the percentage of blacks in the eligible population was 42.1%, and that the selection of 101 blacks for the grand jury list would raise the percentage of blacks on that list to 31.4%. In addition, blacks would constitute 37% of those on the petit jury list. The disparity between the percentage of blacks in the grand and petit jury pools and the percentage of blacks in the population would be 10.7% and 5.1%, respectively.

2. *The Coverup.*

The size of this disparity was sufficiently small to prevent a challenger of the jury lists from establishing a prima facie case of racial discrimination. *Compare Swain v. Alabama*, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 767 (1964) (10% underrepresentation not enough to establish prima facie case) with *Preston v. Mandeville*, 428 F.2d 1892, 1893–94 (5th Cir.1970) (14.3% underrepresentation sufficient to establish prima facie case). The district court, relying in part on its work in a prior civil case against Putnam County, found that the district attorney's office memorandum suggested the 10.7% and 5% disparities in order to prevent defendants from establishing prima facie cases of discrimination. Record, Vol. I at 147.

The jury commissioners followed the advice in the prosecutor's memorandum. Thus, the pre–1978 jury lists in Putnam County were compiled according to racial quotas which are clearly unconstitutional. *See, e.g., Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839, 849 (1950).[2] More importantly for purposes of this case, the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pools appeared to be fairly integrated. Even if a challenge was made in any particular case, it was almost sure to fail because of a lack of proof. Only a defendant possessing direct evidence of intentional discrimination could hope to mount a successful challenge to the grand or petit jury.

3. *The "Smoking Gun."*

The testimony at the evidentiary hearing showed that Amadeo's attorneys did not know of the intentional discrimination by the jury commissioners until several months after Amadeo's trial. In early 1978, Amadeo's counsel was contacted by Christopher Coates, an attorney for the plaintiffs in a voting rights case against Putnam County. As part of his background research in the voting rights case, Coates surveyed "all the jury materials for a 20 to 30 year period." 2d Supp. Record at 42. Coates found the "smoking gun" memorandum from the district attorney's office somewhere in the middle of the mass of documents he obtained from the county clerk. 2d Supp. Record at 50.

Amadeo's counsel immediately incorporated the jury discrimination issue into his

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10. Since we conclude that Amadeo has failed to establish "cause" for his procedural default, we do not address the issue of "actual prejudice" or reach the merits of his jury challenge.

11. Amadeo raised eight issues in his federal petition for habeas corpus. He claims that the jury lists were unconstitutional, that the admission of the "other crimes" evidence denied him a fair trial, that his confession was involuntary, that trial counsel was ineffective, that the trial court gave improper jury instructions on armed robbery, mitigating circumstances and the jury's right to recommend a life sentence, and that the Supreme Court of Georgia failed to properly evaluate the proportionality of his death sentence. The district court considered only the first two issues when it granted the writ. The failure to address the six remaining issues requires a remand for the resolution of these questions.

1. The memorandum also suggested limiting the number of women and people under age 25 on the master jury lists.

2. Although Amadeo is white and blacks were unconstitutionally excluded from the jury array, he nonetheless has standing to raise his challenge here; for, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." *Peters v. Kiff*, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). *See Duren v. Missouri*, 439 U.S. 357, 359 n. 1, 99 S.Ct. 664, 661 n. 1, 58 L.Ed.2d 579 (1979) ("A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class."); *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975) (male defendant had standing to raise "the claim that the exclusion of women from jury service deprived him of the kind of factfinder [sic] to which he was constitutionally entitled").

appeal to the Georgia Supreme Court. That court refused to entertain the claim because it had not been raised at trial. *See Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979), *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The district court, after hearing testimony from counsel, held that this issue was not barred from federal review because Amadeo had demonstrated cause for his failure to object at trial. The majority's reversal of that decision ignores the policies underlying *Wainwright v. Sykes*, and ignores the fact-finding role of the district court.

II. ANALYSIS

Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), announced the rule that federal habeas courts may not entertain procedurally defaulted grand jury challenges by state prisoners absent a showing of "cause" and "actual prejudice." The decision brought the law regarding procedural defaults by state prisoners into line with the law regarding procedural defaults by federal prisoners. *See Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Federalism concerns required giving at least as much deference to state procedural rules as is given to the corresponding federal rules in federal courts. *Francis*, 425 U.S. at 541–42, 96 S.Ct. at 1711.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Court extended the *Francis* "cause" and "prejudice" test to a case involving a failure to contemporaneously object to an error at trial. *Sykes* reiterated the federalism concerns of *Francis*, and gave several examples of how failure to honor the state's contemporaneous objection rules would be an affront to principles of comity. First, it might "encourage 'sandbagging' on the part of defense lawyers, who may take their chances of a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2508. Second, it might "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* at 90, 97 S.Ct. at 2508.

These comity based concerns need to be balanced against the role of the federal habeas court as a tribunal of last resort for state prisoners. Thus, the "cause" and "prejudice" test is designed to ensure the adjudication of federal claims in federal court where the failure to do so would result in a miscarriage of justice. *Id.* at 90–91, 97 S.Ct. at 2508. Consistent with this goal, "this court has ... attempted to secure defendants who have not strategically withheld constitutional objections in state court from the possibility of injustice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B July 1981).

As the majority indicates, any attempt to define cause must take into consideration the federalism principles identified in *Sykes* as well as the overriding duty of the federal habeas court to avoid manifest injustice. *Ante* at 1505. On the facts of this case, both of these factors lead me to the conclusion that Amadeo has demonstrated cause for his failure to raise his jury challenge at the trial level.

The most important comity concerns discussed in *Sykes* simply are not involved in this case. The district court found that Amadeo's counsel did not "deliberately bypass" the state trial court. 1st Supp. Record, Tab 16 at 5. There is no evidence of "sandbagging." At the time of trial, counsel had no reasonable basis for challenging the master jury lists. Since the "smoking gun" memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal claim as "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

The majority suggests, *ante* at 1506–1507, that Amadeo's counsel (William Prior and Roy Lambert) considered an objection to the jury array but decided, as a matter of tactics, to proceed with the jury that was picked. This argument misses the mark for several reasons. First, the claim which counsel considered at trial was a challenge to the composition of the jury array based on *statistical underrepresentation*. One can hardly fault Amadeo's attorneys for rejecting such a challenge, since the racial composition of the array did not suggest a sufficient underrepresentation of blacks to warrant much concern. Indeed, the unconstitutional jury selection process had been specifically designed to withstand challenges based on statistical evidence. Under these circumstances, counsel's pretrial discussions regarding a possible statistical challenge should not preclude Amadeo from raising a claim based on (newly discovered) direct evidence of intentional discrimination in the juror selection process.

Second, a challenge to the jury array is not the same as a challenge to the master jury list. At the evidentiary hearing, Amadeo's counsel noted that the actual array chosen for Amadeo's trial appeared to be fairly integrated. What counsel could not see by looking at the array was that the array was chosen from a master list which was specifically designed to underrepresent blacks. The infection of the selection system at the master list level is not cured by the random selection of arrays from that master list. Once the master list is affected by discriminatory selection procedures, the juries chosen from that list are tainted. It is nearly impossible to predict what type of jury would have been selected if the master list had been compiled in a constitutional manner. Nor is it certain how such a jury would have decided this case. For these reasons, the Supreme Court has indicated that, where the jury has been chosen according to racially discriminatory procedures, prejudice to the defendant is presumed. *See Peters v. Kiff*, 407 U.S. 493, 504–05, 92 S.Ct. 2163, 2169, 30 L.Ed.2d 83 (1972); *cf. Rose v. Mitchell*, 443 U.S. 545, 550–59, 99 S.Ct. 2993, 2997–3002, 61 L.Ed.2d 739 (1979) (discrimination in selection of grand jury not rendered harmless by subsequent conviction by petit jury).

Third, the majority ignores important factual findings made by the district court. After hearing testimony from Amadeo's counsel, the court found that the pressures of being a lawyer in a small rural community served as an effective deterrent against raising claims of jury discrimination. Such claims would necessarily impugn the integrity of county officials, and would jeopardize the lawyer's standing in the community. 1st Supp. Record, Tab 16 at 2. Notwithstanding these community pressures, the court concluded "that if [counsel] had known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so." *Id.* at 4. This finding clearly indicates that counsel did not make a strategic decision to hold back the jury claim in the hopes of obtaining a favorable verdict at trial.

A second comity concern stressed in *Sykes* is the desire to ensure that the trial remains the "main event" in the criminal process. This concern is most important where a defendant deliberately bypasses the opportunity to raise an available claim at trial. It is even relevant where counsel's failure to raise the issue was the result of negligence. *See Murray v. Carrier*, — U.S. —, 106 S.Ct. 2639, 2645–46, 91 L.Ed.2d 397 (attorney "inadvertence" or "ignorance" does not constitute cause under *Sykes*). By refusing to entertain claims "negligently" bypassed, federal courts provide an incentive to the bar to exercise the utmost care in recognizing and raising meritorious claims at trial.

The above concern is irrelevant, however, where neither the defendant nor his counsel were at fault for the procedural default. *See Reed v. Ross*, 468 U.S. 1, 14–16, 104 S.Ct. 2901, 2909–10, 82 L.Ed.2d 1 (1984).[3]

3. For this reason, the majority's reliance on *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), is misplaced. In *Birt*, the only asserted "cause" for failing to raise the jury claim was that counsel rendered ineffective assistance. We *rejected* the ineffectiveness claim and thus found there was no "cause for the defendant's failure to object at trial. *Id.* at 596–601. In the instant case, Amadeo does not al-

The majority suggests counsel was "at fault" because the "smoking gun" memorandum which set forth the county's plan to rig the jury lists was "readily discoverable in the county's public records." *Ante* at 1507. Further, the majority speculates that "[h]ad counsel elected to examine the jury lists, they would have found the memorandum." *Id.*

The majority's "factual findings" are troubling for several reasons. First, there simply is no factual support in the record for the proposition that the memorandum was "readily discoverable" or that Amadeo's counsel "would have found the memorandum" if they had looked. Christopher Coates, the attorney who found the memorandum, testified that he was conducting a broad investigation as to whether blacks historically had been underrepresented in Putnam County. As part of his research, he set out to survey all of the jury materials for a twenty to thirty-year period. Although he did not recall precisely where he found the incriminatory memorandum, he remembered that "it was not on the first page of the materials I was perusing, but somewhere in the stack of materials that [the county clerk] gave me . . . it wasn't on top. I found it because I was going through all the materials." 2d Supp. Record at 41, 50. This testimony belies the majority's assertion that the document was "readily available." Furthermore, it is not at all clear that a search by counsel would have led them to this document. The majority does not suggest counsel should have reviewed twenty years worth of documents as part of their pretrial preparation in this case. It is at least as reasonable to assume counsel would have reviewed only the current jury lists. Since the memorandum was found in the middle of a stack of older documents, I find the majority's factual inferences to be unreasonable.

Moreover, even if there had been no obfuscatory behavior by county officials, it is unreasonable to expect counsel to conduct a detailed search of the county court records. By its holding, the majority deprives petitioner of a forum for his claim because his attorneys, who were facing the usual rigors of pretrial preparation in a capital case, did not find the time to scour the public records in search of evidence of intentional discrimination. Such a ruling ignores the realities of capital defense work and, more importantly, is not necessary to ensure that the trial is the "main event" in the criminal process. Absent some reason to suspect jury tampering (such as statistical evidence of underrepresentation), defense counsel would almost never be able to afford the luxury of examining all "publicly available" documents for favorable evidence. This realization is the basis for the holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring prosecutorial disclosure of evidence favorable to defendant). Defense counsel must be able to rely on the candor of the prosecutor's office. Where the prosecutor's office is a party to the scheme to underrepresent blacks on jury lists, it is particularly unreasonable to expect defense counsel to uncover such malfeasance.

In this respect, this case is analogous to *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In *Reed*, the Court held that "where a constitutional claim is so novel that its *legal* basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16, 104 S.Ct. at 2910 (emphasis added). In the instant case, the *factual* basis of Amadeo's constitutional claim was not reasonably available to counsel. In such a case, as in *Reed*, "it is safe to assume that [counsel] is sufficiently unaware of the [constitutional] question's latent existence that we cannot attribute to him strategic

lege his attorneys were ineffective for failing to raise the jury claim. Amadeo claims counsel could not have raised the claim at trial because the evidence of intentional discrimination was not discovered until after trial. Furthermore, he argues his attorneys lacked sufficient evidence to challenge the jury on the basis of statistical underrepresentation. The allegations of state misconduct in concealing the constitutional violation are sufficient to distinguish this case from *Birt*.

motives of any sort." *Id.* at 15, 104 S.Ct. at 2909–10.

Finally, I cannot ignore the fact that the county did its best to conceal this constitutional violation. The discriminatory scheme was carefully designed to achieve the maximum underrepresentation of blacks without allowing criminal defendants to use the statistical disparity to establish prima facie cases of jury discrimination. The only direct evidence of this scheme was buried somewhere in a stack of documents in the county clerk's office. Under the circumstances, certainly it is no coincidence that this evidence was discovered by an attorney conducting discovery in a civil case. Without the benefit of a prima facie case, criminal defendants and their counsel are unlikely to undertake massive investigations to uncover direct evidence of intentional discrimination.

The fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county. Recent decisions by the Supreme Court and by our court provide support for the proposition that such misconduct by the state can constitute "cause" for failure to raise an issue at trial. In *Murray v. Carrier*, — U.S. —, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Court noted that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at —, 106 S.Ct. at 2646. We have applied this language to excuse default under circumstances significantly less compelling than those in the present case. In *Dorman v. Wainwright*, 798 F.2d 1358 (11th Cir.1986), the defendant dismissed his direct appeal in state court because he had not received a transcript of his trial. Under state law, the defendant's voluntary dismissal of his appeal barred him from further review of alleged trial errors. However, since it was the state's responsibility to furnish the transcript, we found it unnecessary to apply the state's procedural default rule in federal court:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal.

Id. at 1370. It is inconceivable to me that the state misconduct in the present case would not constitute "cause" while the failure to provide a transcript would suffice to make such a showing. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71–72 (5th Cir.1979) (where defense counsel was misled to believe missing witness would be unfavorable, defendant could not be held responsible for counsel's failure to make attempts to locate that witness), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir.1964) (where defense counsel was misled into thinking ballistics test results supported state's theory, counsel's failure to make a specific request for the test results was excused).

The misconduct in this case is particularly egregious because the county prosecutor's office initiated the discriminatory scheme. The prosecutor's knowledge of the prevailing standards for establishing a prima facie case of jury discrimination was the key to the effective concealment of the discriminatory scheme. The prosecutor's office is under a special duty to be candid in criminal cases and I would hope that this duty would be scrupulously honored where the defendant's life is at stake. The thought of one arm of the prosecutor's office suggesting methods to shield unconstitutional jury selection processes while another arm of the prosecutor's office argues to this court that defense counsel should have searched the public records for evidence of the scheme is unconscionable.

In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review. *See Freeman, supra.* Such a result is not

required by *Sykes*, nor is it permitted under our prior cases.

Because I believe Amadeo has shown "cause" for his failure to raise the jury issue at trial, and because the existence of "prejudice" is uncontested, I would affirm the district court's order granting the writ in this case.

Herman CORN, Plaintiff-Appellant,

v.

CITY OF LAUDERDALE LAKES, Defendant-Appellee.

No. 85-6024.

United States Court of Appeals, Eleventh Circuit.

May 14, 1987.

Landowner brought § 1983 action against city seeking money damages for regulatory taking of his property in violation of constitutional rights. The United States District Court for the Southern District of Florida, No. 84-6034-CIV-JAG, José A. Gonsalez, Jr., J., dismissed action, and appeal was taken. The Court of Appeals, Kehoe, District Judge, sitting by designation, held that landowner's claim for money damages under § 1983, stemming from regulatory taking of his property in violation of constitutional rights, was ripe for review based on finality of zoning decision and lack of alternative remedy under Florida law.

Reversed.

1. Federal Courts ⇐13.25

Finality is manifested, for purpose of determining whether § 1983 claim for money damages stemming from regulatory taking of property in violation of federal constitutional rights is ripe for review on merits, by showing that there is no beneficial use to which property may be put. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.9

Subject ordinances challenged by landowner called for complete moratorium on landowner's development of his property, and any request for variance would plainly have been futile, so that zoning decision upon which landowner based his present claim under § 1983 was final one for purpose of determining whether action stemming from regulatory taking of property in violation of federal constitutional rights was ripe for review on merits. 42 U.S.C.A. § 1983.

3. Federal Courts ⇐13.25

Landowner's claim for money damages under § 1983, stemming from regulatory taking of his property by city in violation of his constitutional rights, by enactment of zoning ordinance subsequently declared unconstitutional, was ripe for review based on finality of zoning decision, and lack of any alternative remedy recognized by Florida, such as inverse condemnation action, or action for money damages, based either on trespass or violation of right of due process. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9.

Gary M. Farmer, Ft. Lauderdale, Fla., for plaintiff-appellant.

Jean Freeman Reed, Morgan, Lewis & Bockius, Miami, Fla., for defendant-appellee.

Appeal from the United States District Court, Southern District of Florida.

Before VANCE and ANDERSON, Circuit Judges and KEHOE *, District Judge.

* Honorable James W. Kehoe, U.S. District Judge, Southern District of Florida, sitting by designation.

EDITOR'S NOTE

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ORIGINAL

NO. 87-5277

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONSE IN OPPOSITION
TO THE GRANTING OF A PETITION
FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit Court of Appeals properly found that Petitioner's trial counsel made a tactical decision not to challenge the composition of the grand and traverse jury pools and, therefore, Petitioner's procedural default in failing to make a timely jury challenge was not excusible under the principles of Wainwright v. Sykes, 433 U.S. 72 (1977)?

2.

Whether the Eleventh Circuit Court of Appeals properly found no cause to excuse Petitioner's procedural default with respect to his jury challenges, applying the principles set forth by this Court in Wainwright v. Sykes, 433 U.S. 72 (1977) and Reed v. Ross, 468 U.S. 1 (1984)?

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NO. _____

IN THE
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OCTOBER TERM, 1986

TONY B. AMADEO,

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RESPONSE IN OPPOSITION
TO THE GRANTING OF A PETITION
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PART ONE

STATEMENT OF THE CASE

Petitioner, Tony B. Amadeo, was convicted in the Superior Court of Putnam County, Georgia for the offenses of murder and for criminal attempt to commit theft. Petitioner received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. A motion for a new trial was filed on Petitioner's behalf on December 21, 1977, but was overruled by the Superior Court of Putnam County, Georgia on September 18, 1978.

Petitioner filed a notice of appeal to the Supreme Court of Georgia on October 17, 1978. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences in Amadeo v. State, 243 Ga. 627 256 S.E.2d 382 (1979). Following the submission of briefs on Petitioner's direct appeal, Petitioner

obtained new counsel, who raised additional issues for the consideration of the Supreme Court of Georgia. A motion for rehearing was filed on behalf of the Petitioner raising these additional issues. The Supreme Court of Georgia considered, but rejected, these issues raised in the motion for rehearing, stating its reasons for denying the motion in an opinion dated May 29, 1979. A petition for a writ of certiorari to the Supreme Court of the United States was denied on November 26, 1979 and a petition for rehearing was denied by that Court on January 21, 1980.

Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia. The Superior Court of Putnam County, Georgia, denied Petitioner the relief sought by means of his state habeas corpus petition on February 29, 1980. Next, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. This application was denied on September 10, 1980, with a motion for rehearing being denied on September 24, 1980. A petition for a writ of certiorari was denied by this Court on March 30, 1981, with a petition for rehearing being denied by this Court on May 18, 1981.

Next, Petitioner filed an application for federal habeas corpus relief in the district court, Civil Action No. 81-122-MAC, raising all of the grounds contained in his application for state habeas corpus relief, except for Petitioner's contention that he received ineffective assistance of counsel because of the failure of his trial attorney to raise a challenge to the composition of the grand and traverse juries prior to Petitioner's trial. On September 22, 1982, the district court dismissed the prior application for federal habeas corpus relief without prejudice, based on Petitioner's failure to exhaust his contentions concerning ineffective assistance of counsel.

On October 25, 1982, Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, raising his contention of ineffective assistance of counsel with regard to trial counsel's failure to challenge the composition of the grand and petit juries. Respondent filed an answer to this petition for a writ of habeas corpus and also filed a motion to dismiss the petition, asserting that the claim had been waived under O.C.G.A. § 9-14-51 and that this petition for a writ of habeas corpus should be dismissed as successive. A hearing was conducted in the Superior Court of Butts County, Georgia on March 14, 1983. On March 16, 1983, Respondent's motion to dismiss was granted by the Superior Court of Butts County. Petitioner filed an application for a certificate of probable cause to appeal and Respondent filed a response in opposition to this application. On June 21, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and Petitioner's motion for reconsideration was denied by that court on July 7, 1983.

Next, Petitioner filed a petition for a writ of certiorari in this Court on September 3, 1983 and Respondent filed a brief in opposition to the granting of a petition for a writ of certiorari on October 4, 1983. On October 31, 1983, this Court denied the petition for a writ of certiorari and a petition for rehearing filed on behalf of the Petitioner was denied on January 9, 1984.

Petitioner then filed a second application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. The second application for federal habeas corpus reief was filed on January 25, 1984. An Answer-Response was filed on behalf of the Respondent on March 26, 1984. A brief in support of Petitioner's petition for a writ of habeas corpus was also filed on March 26, 1984.

On April 27, 1984, Petitioner filed a motion for partial summary judgment. On May 17, 1984 the United States District

Court entered an order granting federal habeas corpus relief, vacating Petitioner's conviction and sentence and directing that Petitioner be reindicted and retried. Judgment was entered in favor of the Petitioner on May 18, 1984. (R., Vol. I, p. 151). On June 15, 1984, Respondent filed a timely notice of appeal to the Eleventh Circuit.

The Eleventh Circuit remanded the case to the district court on September 27, 1985 for an evidentiary hearing on the issue of "cause" and "prejudice" alleged to be present for excusing Petitioner's procedural default. Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985). Following the conducting of an evidentiary hearing in the district court, the district court again granted federal habeas corpus relief, finding cause and prejudice to excuse Petitioner's procedural default. The Eleventh Circuit reversed the granting of federal habeas corpus finding Petitioner to have committed a procedural default. Amadeo v. Kemp, 816 F.2d 1502 (11th Cir. 1987). It is this order that Petitioner seeks to have reviewed by this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. TRIAL COUNSEL'S TACTICAL DECISION NOT TO CHALLENGE THE GRAND AND PETIT JURY RESULTED IN A PROCEDURAL DEFAULT WITH RESPECT TO THE JURY CHALLENGES, AS THE TACTICAL DECISION COULD NOT SERVE AS "CAUSE" FOR EXCUSING PETITIONER'S PROCEDURAL DEFAULT UNDER GEORGIA LAW.

In Petitioner's case, the Eleventh Circuit Court of Appeals found that Petitioner had not established "sufficient cause" within the meaning of Wainwright v. Sykes, 443 U.S. 72 (1977) to excuse Petitioner's procedural default with respect to his failure to timely challenge under Georgia law the composition of the grand and petit jury in Putnam County, Georgia. Petitioner asks this Court to grant this petition for writ of certiorari because Petitioner alleges that it was not due to his trial attorney's tactical decision that the jury composition issue was not litigated, but rather Petitioner claims that the jury issue was not litigated allegedly due to government "disception" and "covert interference" with Petitioner's constitutional rights. This claim is not borne out by the record before the district court and the Eleventh Circuit. Instead, the record clearly establishes that the failure of Petitioner to challenge the composition of the grand and traverse juries at the time of his trial, as required by Georgia law, was due to trial counsel's tactical determinations. Amadeo v. Kemp, 816 F.2d 1502, 1506 (11th Cir. 1987).

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. However, Georgia procedure, as well as federal procedure, recognizes a "cause" exception to this timeliness

requirement. Simmons v. State, 226 Ga. 110, 172 S.E.2d 680 (1970); Francis v. Henderson, 425 U.S. 536 (1976). It is uncontested that Petitioner did not challenge the composition of the grand and traverse jury list from which the jurors sitting at his trial were drawn at the time of trial, as required under Georgia law. However, Petitioner did raise his challenge to the composition of the grand and traverse juries on direct appeal to the Supreme Court of Georgia. The Supreme Court of Georgia determined that Petitioner's challenge to the composition of these juries came too late. Amadeo v. State, 243 Ga. 627(4), 256 S.E.2d 382 (1979); citing Goodwin v. Hopper, 243 Ga. 193, 253 S.E.2d 156 (1979).

Similarly, in Petitioner's state habeas corpus proceeding conducted in the Superior Court of Putnam County, Georgia, the state habeas corpus court did not consider the jury composition issue on its merits. Instead the state habeas corpus court determined that it was precluded from reviewing this issue because the issue had been previously determined on direct appeal by the Supreme Court of Georgia. However, the federal district court found that there was cause to excuse Petitioner's procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977) finding that there was a lack of "deliberate withholding" of the claim and an intentional underrepresentation. As the Eleventh Circuit noted, "the district court excused this procedural default, finding that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials." Amadeo v. Kemp, 816 F.2d 1502, 1505 (11th Cir. 1987). However, these factual findings made by the district court were challenged on appeal to the Eleventh Circuit by the Respondent and also the validity of these factual findings as a basis for a conclusion that "cause" existed under Wainwright v. Sykes, supra. .

On appeal to the Eleventh Circuit, the Eleventh Circuit noted that in originally remanding this case for a

determination of whether or not cause existed within the meaning of Wainwright v. Sykes, supra, that Court had directed that the district court determine, pursuant to the standards set forth by this Court in Reed v. Ross, 468 U.S. 1 (1984), whether or not cause existed. In remanding the case for a "cause" determination, the Eleventh Circuit stated:

> To fulfill the causation prong . . . it is necessary for Petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate by-pass.

Amadeo v. Kemp, 773 F.2d 1141, 1145 (11th Cir. 1985). The Eleventh Circuit properly reversed the district court's finding of "cause" based on the testimony of Petitioner's trial counsel given at the evidentiary hearing conducted in the district court pursuant to the Eleventh Circuit's remand.

As noted by the Eleventh Circuit, in this Court's decision in Reed v. Ross, supra, there is a "virtually limitless array of contexts in which a procedural default can occur". Reed v. Ross, supra, at 13. The Eleventh Circuit was clearly authorized to conclude based on the testimony at the evidentiary hearing at the district court that Petitioner's trial counsel considered making a challenge to the grand and petit juries, but rejected such a challenge for "various tactical reasons". Amadeo v. Kemp, 816 F.2d 1502, 1506 (11th Cir. 1987).

Mr. William A. Prior, Petitioner's trial attorney, testified as follows with reference to his consideration of filing a jury challenge on Petitioner's behalf:

> We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a

list of the jurors and we met with an attorney in Putnam County who had been there for many years, Mr. Dallas Veal. We knew -- personally or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item, we decided not to file a challenge. The reason being that we frankly thought that if we filed it in one, we would wind up in worse shape than we were. There were certain people on the Jury that we thought would be favorable to us on the panel. So, all things considered, we did consider it, and decided not to file.

(Evidentiary hearing transcript, pp. 8-9). Mr. Prior further testified:

> We identified on the jury list each juror, prior to trial, in regard to whether they were black or white so we knew the actual members on the Traverse List, who was black and who was white and as I recall that, they were approximately evenly divided.

(Evidentiary hearing transcript, p. 10).

Mr. Prior testified that there were either 110 or 120 jurors and that the black-white ratio was approximately even, with there being numerous women included on the list. Finally, and most tellingly, Mr. Prior testified that:

> . . . But I guess the point I want to make is that I did consider -- Mr. Lambert and I did consider challenging the array and it

> was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a jury list as we could get. We were aware of the fact that the district attorney was likely to be able to introduce other crimes and these other crimes involved the white defendants . . . I'm not certain of the actual racial make-up of the twelve member jury. As I recall though, it was approximately evenly divided.

(Evidentiary hearing transcript, p. 11-12).

When Mr. Prior was questioned with respect to his awareness of prior jury challenges to the Putnam County master jury list, he stated:

> I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would have been one, if had been instituted . . . . The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were. There were several factors; I don't think I mentioned the religious factor. There was at that time in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "Shepard" was in it somewhere, I think, but at any rate, it was

> very active, had a relatively large following in Putnam County and several of these people had visited the defendants in jail and we knew that there were several people on that particular 110 or 120 person pa[illegible]l who were involved in that and that was another reason for thinking we were doing about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

(Evidentiary hearing transcript, 12-13).

Although Mr. Prior testified that he did not recall having any knowledge of the memorandum to the jury commissioners from the district attorney concerning the composition of the jurors, Mr. Prior testified, "we considered challenging it [the composition of the juries] and we thought we would win if we challenged it." (Evidentiary hearing transcript, p. 20).

Under this Court's decision in Reed v. Ross, supra, a tactical decision to forego a procedural opportunity cannot qualify as "cause" for purpose of allowing a federal habeas corpus court to review procedurally defaulted claims on their merits. Reed v. Ross, supra, at 14, cited in Amadeo v. Kemp, 816 F.2d 1502, 1505-1506 (11th Cir. 1987). The district Court improperly relied upon existence of the memorandum from the district attorney to the jury commissioners concerning altering the racial composition of the master jury list, as being a basis for excusing Petitioner's procedural default, in light of the extent of testimony from Petitioner's trial attorneys detailing their strategic decisions in declining to file a jury composition challenge.

The Eleventh Circuit properly applied the principles set forth by this Court in Wainwright v. Sykes, supra, and Reed v. Ross, supra, in reversing the conclusion of the district court that the "concealment" of the memorandum from the county

prosecutor advising the jury commissioners to add specific numbers of blacks to the master jury list excused the procedural default. Amadeo v. Kemp, supra at 1507. The Eleventh Circuit properly concluded as follows:

> The memorandum detailing the county's efforts to alter the racial composition of the master jury list was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury list, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury list and thereby did not become aware of the memorandum until its discovery during the Bailing v. Vining voting rights case. These facts, in our opinion, do not establish sufficient 'cause' to excuse Amadeo's procedural default.

Amadeo v. Kemp, supra at 1507.

Therefore, contrary to Petitioner's assertions, the jury composition issue was not foregone due to "government deception" and "covert interference" by the government with the Petitioner's exercise of his constitutional rights, but was based on a considered tactical decision by Petitioner's competent trial counsel.

Petitioner now alleges, but has never proven, that the "state deliberately concealed evidence of unconstitutional conduct". Rather, as noted, trial counsel for Petitioner was of the opinion that the Putnam County grand and traverse jury lists were challengeable and that such a challenge would probably be successful, but instead, chose to exercise their

strategic choices in declining to make a challenge to the composition of the grand and traverse juries. The fact that the memorandum by the district attorney to the jury commissioners might have supported a challenge to the juries does not negate the fact that there was a tactical decision made to forego the right to a jury challenge. Petitioner has not and cannot establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639, 2645-2646 (1986).

Because Petitioner's jury challenge was deliberately withheld based on a strategical decision by competent trial counsel, Respondent submits that the equitable character of habeas corpus relief cited by Petitioner, as contained in this Court's decision in Wainwright v. Sykes, supra and Kuhlman v. Wilson, ___ U.S. ___, 106 S.Ct. 2616 (1986), does not permit cause to be established by alleging that the government acted improperly in directing the jury commissioners to attempt to obtain specific percentages in the racial composition of the master jury list. There is no support for Petitioner's contention that the failure to litigate was based on government "deception", as the memorandum which Petitioner alleges would have supported the jury challenge was on file in the clerk's office and, therefore, was in fact a matter of public record for whatever use of it could be made at the time of Petitioner's trial. Additionally, the fact that the memorandum was discovered close in point of time to Petitioner's trial also establishes that the memorandum was not "concealed", but rather was available as an alleged basis for the filing of the jury composition claim, which was strategically foregone in this case. See Amadeo v. Kemp, at 1506-1507.

In short, this case fits clearly with the confines of this Court's decisions in Wainwright v. Sykes, supra and Reed v. Ross, supra, and stands for the proposition that cause for excusing a procedural default under state law cannot be established where the failure to pursue the procedurally defaulted claim was based on the reasonable strategical choices of competent trial counsel.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this petition for a writ of certiorari raises no exceptional question which would warrant the granting of a writ of certiorari and, therefore, this petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Op. Cert. Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 22nd day of September, 1987.

Susan V. Boleyn

SUSAN V. BOLEYN
Senior Assistant
Attorney General

(Opinion February 17, 1987, 11 Cir., 1987, 809 F.2d 1534)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc *without* oral argument on a date hereafter to be fixed. The previous panel's opinion is hereby VACATED.

Tony B. AMADEO, Petitioner-Appellee,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellant.

No. 84-8455.

United States Court of Appeals, Eleventh Circuit.

April 30, 1987.

Petitioner, who was inmate under sentence of death, filed petition for habeas corpus relief. The United States District Court for the Middle District of Georgia, granted relief, and state appealed. The Court of Appeals, 773 F.2d 1141, remanded. On remand, the United States District Court for the Middle District of Georgia, 84-76-1-MAC, Wilbur D. Owens, Jr., Chief Judge, granted relief, and state appealed. The Court of Appeals held that: (1) petitioner was not denied his right to fundamentally fair trial by admission of evidence of other crimes, where admission was proper under state law, and there was overwhelming evidence of his guilt, and (2) notwithstanding evidence that county officials manipulated jury lists to maintain racial imbalance, petitioner who failed to challenge racial makeup of master jury lists for tactical reasons was not entitled to relief.

Reversed and remanded.

Clark, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐369.2(1), 374

In order to admit evidence of independent crimes under Georgia law, defendant must be shown to have been perpetrator of independent crime, and there must be sufficient connection between independent crime and offense charged so that proof of former tends to prove latter.

2. Habeas Corpus ⇐45.2(6)

In considering state evidentiary objections, federal court exercises limited review, and evidentiary error must have been of such magnitude as to deny fundamental fairness to criminal trial, thus violating due process clause. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐96

In determining whether admission of prejudicial evidence constitutes denial of fundamental fairness, federal court must decide whether evidence is material in sense of crucial, critical, highly significant factor. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⇐369.2(4, 6)

Defendant was not denied fundamental fairness in prosecution for murder and attempted armed robbery by introduction of evidence of other murder and armed robbery, where admission of evidence was proper under Georgia law, and there was overwhelming evidence of defendant's guilt. U.S.C.A. Const.Amend. 14.

5. Habeas Corpus ⇐45.3(1.50)

Federal habeas corpus court will not consider issue if petitioner did not pursue issue in state court and thereby committed procedural default, unless he can overcome

this bar by showing cause for an actual prejudice from default.

6. Habeas Corpus ⇐45.3(1.40)

Notwithstanding evidence that county officials attempted to manipulate jury lists to exclude blacks, defendant whose counsel failed to raise challenge of racial makeup of jury at trial court could not obtain federal habeas corpus relief on that basis, where decision to not challenge that trial court was based on tactical reasons, and counsel did not review jury lists and thereby become aware of discriminatory memorandum until after conviction. O.C.G.A. §§ 9-14-42(b), 15-12-162; U.S.C.A. Const. Amend. 14.

Michael J. Bowers, Atty. Gen., Marion O. Gordon, 1st Asst. Atty. Gen., William B. Hill, Jr., Sr. Asst. Atty. Gen., Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant.

William M. Warner, Atlanta, Ga., for petitioner-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal is before this panel for the second time. The petitioner-appellee, Tony B. Amadeo, a Georgia state prisoner under sentence of death,[1] sought a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court granted the writ, concluding (1) that the introduction of "other crimes" evidence rendered Amadeo's trial fundamentally unfair and (2) that minority groups were underrepresented on the master jury lists in Putnam County, Georgia, the location of Amadeo's trial. In the first appeal, we remanded the case for a hearing to determine whether Amadeo could establish sufficient "cause" to excuse his failure to challenge the jury lists at the trial as required by Georgia law. We reserved judgment on the "other crimes" evidence issue. *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir.1985) (per curiam). On remand, the district court conducted a hearing and determined that sufficient "cause" existed to excuse Amadeo's procedural default. The case is now back before us to resolve both issues on the merits. We find that Amadeo has not established sufficient "cause" to excuse the procedural default and that the introduction of the "other crimes" evidence did not deny him a fair trial in violation of his due process rights. Accordingly, we reverse the judgment of the district court.

I.

The district court first held that Amadeo's right to a fundamentally fair trial was violated by the admission of evidence of other crimes. This evidence established that Amadeo by his own admission made in the form of a statement to the police, had been involved in a robbery and homicide in Colbert County, Alabama on September 28, 1977, the night prior to the murder and attempted robbery in Putnam County, Georgia, which occurred at approximately 8:30 A.M. on September 29, 1977. *See* Record on Appeal, Exhibit I, Vol. II, pp. 200-02.

[1] On direct appeal, the Supreme Court of Georgia approved the admission of this evidence, finding that it met the Georgia standard for the admissibility of similar crimes evidence.[2] The supreme court also noted that the trial court instructed the jury that such evidence could be considered only to illustrate Amadeo's state of mind at the time of the Putnam County homicide and for no other reason. *Amadeo v. State*, 243 Ga. 627, 629, 255 S.E.2d 718, 720, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). Therefore, the supreme court held that the admission of the evidence, for that limited purpose, was a recognized exception in Georgia to the general rule against the admissibility of evidence of other criminal activities.[3]

The district court found that it was unnecessary for the State to introduce this evidence to establish identity, motive or intent to rob or to rebut Amadeo's defense of an accidental shooting, and consequently ruled that the evidence was inadmissible and nothing more than prosecutorial overkill. The court reached this conclusion because at the time the state trial judge considered Amadeo's motion to exclude this evidence, the State had a written confession signed by the appellee.[4] Also, an eyewitness identified Amadeo as the person who fired the fatal shot and there was conclusive ballistics testimony.[5]

[2, 3] In our view, this is not the proper inquiry in a federal habeas corpus proceeding. In considering state evidentiary objections, a federal court exercises limited review. The evidentiary error must have been "of such a magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.),[6] *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). *See also Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984) (per curiam), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). In determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness, a federal court must decide whether the evidence is "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d at 401. *See also Osborne v. Wainwright*, 720 F.2d 1237, 1238-39 (11th Cir.1983) (per curiam).

[4] We reject the district court's reasoning for several reasons. First, the Supreme Court of Georgia expressly ruled that the evidence was properly admitted under state law, a determination that is binding on this court as well as the district court. Since introduction of this evidence was relevant as a matter of Georgia law,

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1. Amadeo was convicted of murder and attempted armed robbery in the Superior Court of Putnam County, Georgia on November 30, 1977. The pertinent factual and procedural history of this case is contained in our first opinion, *Amadeo v. Kemp*, 773 F.2d 1141, 1142 (11th Cir. 1985) (per curiam) and in the opinion of the Supreme Court of Georgia, *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979).

2. As stated in *French v. State*, 237 Ga. 620, 621, 229 S.E.2d 410, 411 (1976), the first criterion for the admission of evidence of independent crimes is that the defendant must be shown to have been the perpetrator of the independent crime. The second requirement is that there be a sufficient connection between the independent crime and the offense charged so that the proof of the former tends to prove the latter. *See also Felker v. State*, 252 Ga. 351, 359, 314 S.E.2d 621, 631, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

3. The Georgia Supreme Court concluded that the evidence was probative of motive, i.e., that the Alabama and Georgia crimes were committed for the same reason, to obtain money while Amadeo was AWOL from the United States Marine Corps. *Amadeo v. State*, 243 Ga. at 629, 255 S.E.2d at 720.

4. The confession recited:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old white man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. Then I shot him. I shot one time. The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.
>
> Record on Appeal, Exhibit I, Vol. II, p. 225.

5. However, counsel for Amadeo maintained in opening and closing argument that the confession was involuntary and that the shooting was accidental. While no evidence was introduced by the defense on this issue, the potential for such defenses remained at the time of the admission of the "other crimes" evidence.

6. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

we cannot say that its admission denied Amadeo fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir.1983) (per curiam), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984).

Even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Amadeo's guilt of the Georgia murder defeats his argument that evidence of the Alabama crimes constituted a "crucial, critical, highly significant factor" in the case against him.

In any event, the overwhelming nature of the other evidence establishing Amadeo's guilt would render any constitutional error harmless beyond a reasonable doubt. *See Rose v. Clark*, — U.S. —, —, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1985): "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, but not a perfect one.'" *See also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

II.

The district court also predicated its grant of the writ on its finding that the 1977 master jury lists in Putnam County underrepresented women and blacks, depriving Amadeo of his equal protection rights. Amadeo did not attack the composition of the jury lists at the trial; he first raised the issue on direct appeal to the Supreme Court of Georgia. That court refused to address this assignment of error because of Amadeo's failure to complain of this possible infirmity at the time of trial. The district court excused this procedural default, finding that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials. Before reaching the merits of the jury composition issue, we must first examine Amadeo's failure to challenge these jury lists during his state court trial and the district court's conclusion that cause existed to forgo this challenge.

[5] A federal habeas corpus court will not consider an issue if the petitioner did not pursue that issue in the state court and thereby committed a procedural default, unless he can overcome this bar by showing cause for and actual prejudice from the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Georgia law clearly requires a criminal defendant to make a timely jury challenge at the trial. *See* O.C.G.A. §§ 15-12-162, 9-14-42(b). It is also undisputed that Amadeo failed to make such a timely challenge and that this failure constituted a procedural default under Georgia law. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720. Consequently, our inquiry turns to whether Amadeo can overcome this procedural bar by demonstrating sufficient "cause" and "actual prejudice."

Because federal courts must analyze "cause" under a wide variety of circumstances, no court has yet accorded that term a precise definition. Rather, guidance is provided by the policy rationale for the "cause" requirement. The avowed purpose of this requirement is to preserve the integrity of state judicial procedures and to bind a defendant to the tactical decisions of competent counsel, absent a miscarriage of justice. *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, 13 (1984); *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 518, 78 L.Ed.2d 699 (1983).

> In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court.
>
> ....
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

Reed v. Ross, 468 U.S. at 14, 104 S.Ct. at 2909, 82 L.Ed.2d at 13-14.

The Supreme Court furnished further instruction on this point in a recent decision:

> [W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel ... or that 'some interference by officials' ... made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, — U.S. —, —— —, 106 S.Ct. 2678, 91 L.Ed.2d 427 (1986).

We remanded this case to the district court to make the inquiry outlined in *Reed*. "To fulfill the causation prong ... it is necessary for petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d at 1145. That hearing established the sequence of events relating to Amadeo's failure to challenge the jury lists.

Amadeo's trial counsel, William A. Prior and E.R. Lambert, testified that they considered making a challenge to the grand and petit juries and were aware that minorities were probably underrepresented in the Putnam County master jury lists. Record on Appeal, 2d Supp., pp. 8, 11-13, 20. However, after reviewing the petit jury venire with a local attorney, they elected not to pursue the challenge for various tactical reasons.

First, they were satisfied with the representation of blacks on the venire, which was approximately fifty percent. *Id.* at 10. One attorney stated that he would be reluctant to try the case with any more blacks on the venire because the State possessed evidence that Amadeo, a white male, had assaulted a number of blacks in Alabama and Mississippi. The lawyer feared that a jury heavily weighted with black jurors might become prejudiced against Amadeo if the State introduced this evidence at the trial. *Id.* at 12. Second, the attorneys were satisfied with the existing venire because it contained several members of a charismatic religious group that had shown some sympathy for the welfare of local prisoners. *Id.* at 13. Such individuals were viewed as less likely to impose the death penalty. *Id.* at 30. Counsel also were aware that these advantages might be lost if the venire was challenged and the master list was reconstituted. *Id.* at 9.

Amadeo's lawyers confirmed their decision to waive a jury challenge when the actual jury selected for Amadeo's case contained an even number of blacks and whites and a majority of women. *Id.* at 12, 35-36. As such, they made no challenge to either the grand or the petit juries and did not make an effort to examine the master jury lists. As one lawyer testified, "it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with [a local attorney]; we felt like we had about as good a Jury List as we could get.... we made a tactical decision, a knowing, tactical decision not to challenge the array." *Id.* at 12-13.

After Amadeo was convicted and sentenced to death, and while his direct appeal was pending before the Supreme Court of Georgia, Christopher Coates, counsel in an unrelated civil suit, *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D.Ga. Aug. 15-

17, 1978),[7] discovered a 1977 memorandum from the county prosecutor advising the jury commissioners to add specified numbers of blacks to the lists. The memorandum was filed in the book containing the master jury lists and was available to anyone examining those lists. Record on Appeal, 2d Supp., pp. 41–42, 49–50. The district court characterized this memorandum as an effort to protect the jury lists from constitutional scrutiny by placing the names of enough blacks on the lists to preclude a prima facie case of jury discrimination, but still maintain as much racial disparity as possible.[8] Counsel advised Amadeo's counsel of this memorandum and they amended their appeal to include a challenge to the composition of the jury. As stated earlier, the Georgia Supreme Court declined to reach this issue because of the procedural default. *Amadeo v. State*, 248 Ga. at 629–30, 285 S.E.2d at 720.

The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey v. Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.[9]

[6] We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury lists and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

Our decision finds support in a 1984 decision of this court. In *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), a Georgia state prisoner maintained that his trial counsel's failure to question the racial composition of the jury was unreasonable and thereby constituted "cause" excusing the procedural default as well as ineffective assistance of counsel. In that case, as here, the lawyer considered a jury challenge and made a preliminary inquiry into the composition of the jury. *Id.* at 598. He decided to abandon the challenge, again for tactical reasons. In the opinion of the attorney, the racial mix of the jury venire and the actual jury empaneled to try the case was advantageous to the defendant and this advantage might be lost in a jury drawn from a revised list. *Id.* at 598–99. We found counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600–01. *See also Straight v. Wainwright*, 772 F.2d 674, 677–78 (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

7. *Bailey v. Vining* was a voting rights action challenging the at-large election system used in Putnam County.

8. Courts have indicated that a ten percent or smaller disparity between the proportion of a minority group in the relevant local population and its representation on jury lists is acceptable under the Constitution. Larger disparities may justify finding an equal protection violation. *See Swain v. Alabama*, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965); *Bowen v. Kemp*, 769 F.2d 672, 684–86 (11th Cir. 1985); *Preston v. Mandeville*, 428 F.2d 1392, 1393–95 (5th Cir.1970). *See generally Castaneda v. Partida*, 430 U.S. 482, 494–95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510–11 (1977) (elements of a prima facie case of jury discrimination). After the Putnam County jury commissioners complied with the prosecutor's suggestion, the grand jury list underrepresented blacks by 10.7% and the petit jury list underrepresented blacks by 5.1%. *See* Record on Appeal, Petitioner's Exhibit 4.

9. In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury. *See* Record on Appeal, 2d Supp., pp. 25–27, 46, 38–39, 62. These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.

(A)

No. 87-5277

Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 10, 1987
CERTIORARI GRANTED OCTOBER 19, 1987

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RELEVANT DOCKET ENTRIES

September 29, 1977	Offense Date
November 30, 1977	Petitioner Convicted and Sentenced to Death, Putnam County, Georgia
May 2, 1979	Convictions and Sentence Affirmed, Supreme Court of Georgia
February 29, 1980	Denial of Petition for State Habeas Corpus, Superior Court, Putnam County, Georgia
September 10, 1980	Denial of Certificate of Probable Cause to Appeal Denial of State Habeas Corpus Relief, Supreme Court of Georgia
May 17, 1984	Order and Memorandum Decision of the United States District Court for the Middle District of Georgia Granting Habeas Corpus Relief
September 30, 1985	Opinion of the United States Court of Appeals for the Eleventh Circuit Remanding to the District Court
November 15, 1985	Order and Memorandum Decision of the United States District Court for the Middle District of Georgia Finding Cause and Prejudice
June 18, 1987	Opinion of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

Civ. A. No. 84-76-1-MAC

TONY B. AMADEO

v.

RALPH KEMP, Warden

COUNTY PROSECUTOR'S MEMORANDUM TO JURY COMMISSIONERS *

TRAVERSE JURY

	125 B.F.		
7 Names	75 W.F.		
Traverse	8 W.F.	(18-24 yrs of age)	
7	04 B.F.	(19-24 yrs of age)	= 212 Female
	8 W.M.	(18-24 yrs of age)	
	4 B.M.	(18-24 yrs of age)	

GRAND JURY

	46 BF	9	37	
Names	30 WF	7	23	
Grand	2 BF	(21-25 yrs of age.		
	2 BM	"	"	"
	2 WF	"	"	"
	2 WM	"	"	"

---

* A copy of the memorandum was entered into evidence before the district court. [Transcript of November 15, 1985 Hearing at 63]. For the convenience of the Court, the memo is reproduced in printed form, as well as in its original handwritten form.

Result:

Traverse Jury			
485 Males 60%	Pop.	%	48.4
322 Women 40%	"	"	51.6
298 Black 37%	Pop.	%	42.1
509 White 63%	"	"	51.6
24 18-24 age 2%	"	"	17.2
Grand Jury			
226 Males 70%	Pop.	%	48.4
96 Women 30%	"	"	51.6
101 Black 31.4%	Pop.	%	42.1
221 White 68.6%	"	"	51.6

Traverse Jury

125 B.F
75 W F
8 W F (18-24 yrs of age)
04 B.F. (18-24 yrs of age)

= 212 Female

8 W.M. (18-24 yrs of age)
4 B.M. (18-24 yrs of Age)

Grand Jury

46 B F (9) 37
30 W F (11) 93
2 B F (21-25 yrs of Age.
2 B M .. .. ..
2 W F .. .. ..
2 W M .. .. ..

Result:

Traverse Jury

485	males	60%	pop. %	48.4
322	Women	40%	.. ..	51.6
298	Black	37%	pop. %	42.1
509	White	63%	.. ..	51.6
24	18-24 age	2%	.. .	17.2

Grand Jury

226	males	70%	pop. %	48.4
96	Women	30%	. ..	51.6
101	Black	31.4	pop. %	42.1
221	White	68.6	.. ..	51.6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

Civ. A. No. 76-199MAC

BAILEY

v.

VINING

EXCERPT FROM TESTIMONY OF R.W. DENNIS, SR.

County Court Clerk and Secretary to Jury Commissioners,
(August 15-17, 1978) [at 112-120]

BY MR. COATES:

Q Would you state your full name, please, for the record?

A R. W. Dennis, Sr.

Q And Mr. Dennis, do you hold an official office in Putnam County?

A Yes, I do.

Q And what position is that?

A That's Clerk of the Superior Court.

Q And that's an elected position?

A Yes, it is.

Q And how long, sir, have you held that position?

A 18 years.

Q So you were elected for the first time in 1960?

A '60. Yes.

Q Mr. Dennis, what was the situation concerning black representation on the traverse jury in 1960 when you were clerk of the court. Let me first ask, did you bring the minute book?

A Yes, I did. 1938 to 1977. What year was that?

Q 1960.

THE COURT: What is it you are asking him now, please?

MR. COATES: The racial composition of the jury list.

THE COURT: If he knows it? Do you have such figures, Mr. Dennis?

THE WITNESS: No sir, not the racial composition.

THE COURT: Ask him something else, please.

Q MR. COATES: I would ask you to look with regard to 1960. Would you look at entry No. 220 on the master traverse jury list?

A 220?

Q Yes sir.

A All right.

Q And that name is John Brown?

A No sir. It's Mrs. Charlie Hawkins.

Q That is 1960?

A Wait. I'm sorry. Did you say grand or traverse? You said traverse, didn't you?

Q This would be grand.

A John Brown. Right.

Q And that's marked colored?

A Right.

Q Are any other names on the list marked by color?

A No sir.

Q Would it be correct to say that Mr. John Brown was the only black on the master grand jury list in 1960?

A I have no idea. I couldn't tell you whether all these people are black or white. I would say that by him being set out he was colored, that he was colored.

Q If there were other black people on the list or other colored persons, would the name have been marked just like Mr. Brown's?

A I guess so. Mrs. Marshall was clerk. She handled this list. I didn't have anything to do with it.

Q Now looking to the 1960 traverse master jury list, isn't it true that there are 547 names on it?

A That's correct.

Q And the last person is Mr. Roy Bowden?

A That's correct.

Q And he is marked colored?

A That's correct.

Q Are any of the other 546 names marked colored?

A No sir, they are not.

Q Now having perused those records, Mr. Dennis, is it fair to say that in 1960 a segregated jury list was kept by Putnam County?

A Yes, according to this book.

Q Is it true to say that there was one black person on the master grand jury list and one black person on the traverse jury list?

A That's correct.

Q Did you meet with—as secretary did you meet with the board of jury commissioners in 196[illegible]?

A No.

Q Did you have an occasion to meet with them in 1962 when the new list was drawn up?

A Yes, I did.

Q Was there any discussion at that time concerning the under-representation of blacks on the grand and traverse jury lists?

A Yes, there was.

Q And what was done in 1962?

A They were all put in together. I don't know which are black and which are white. They are not designated

Q The list was desegregated?

A Yes sir.

Q Was any reason why that practice was commenced?

A Yes. I didn't like the practice of doing that.

Q So you specifically requested it?

A I requested the jury commissioners to let's put them all in alphabetical order.

Q You could tell from the 1960 list that blacks had been severely under-represented?

A Yes sir.

Q Did you make any request that something be done to correct that practice?

A Yes.

Q And what did you request?

A I requested that more blacks be put in the jury box.

Q How many blacks were put in the jury box?

A I don't have any idea. They are not designated on this list. I will say that they were taken from the tax digest at that time instead of voters list.

Q In 1967 did the jury commissioners get correspondence from Solicitor Lawrence?

A 1967?

Q Yes sir. Concerning the under-representation of blacks on the traverse and grand jury lists?

A I don't have a copy of that letter.

Q Would you refer to the 1967 minutes, please?

A We didn't meet in '67.

Q There would have been a '66 meeting to draw up names for two years, but then there was a '67 list, was there not?

A That's correct.

Q And prior to the time that meeting was held, did the jury commissioners, or did you get correspondence from Solicitor Lawrence concerning the under-representation of blacks on the master grand and traverse jury lists?

A I'm not saying we got written communication but we did have a recommendation from Solicitor Lawrence that we send out questionnaires to everyone on the—not on the jury list, on the voters list.

Q Did you have oral communication with Solicitor Lawrence?

A Evidently we did, yes sir. I don't have anything in writing here. I would have kept a letter if he had written it.

Q Did Solicitor Lawrence tell you he had just had a case reversed by the Supreme Court in another county in the judicial circuit that Putnam County is in?

A That's been eleven years ago, Mr. Coates. I can't remember exactly what was said.

Q When were the first black jury commissioners appointed in Putnam County? Well, let me ask you specifically, is it true that the first black jury commissioners in Putnam County were appointed in 1972 and those two members would have been Jimmy Davis and Tinch Mitchell?

A That's right, and the first time that they sat on the jury commission we met August 5, 6, 7, and 8, 1974.

Q Were there qualified black persons in Putnam County to be jury commissioners prior to 1972?

A Yes.

Q Do you know why no black person had ever been appointed?

A No.

Q In 1977, after Judge Jackson ruled that the jury list needed to be reconstituted, did you receive a memorandum from the office of the solicitor?

A Yes.

Q I will show you what's been marked as Plaintiffs' Exhibit A and ask if you could identify it.

A Yes sir, there's some parts of it missing, but it's immaterial.

Q Sir?

A There's some parts of this copy you have—you don't have some parts on there that I have on a copy of mine. It's immaterial though, I think.

THE COURT: Let me see the complete copy.

Q MR. COATES: In reconstituting the jury list, Mr. Dennis, did the jury commissioners aim at the figures suggested there by the writer of this memorandum?

A Yes, they did. I turned that list over to the chairman of the jury commission.

Q With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on the grand jury list?

A Yes.

Q And that was supposed to bring the percentage up to 31.4 percent?

A Correct.

Q With regards to—

THE COURT: Is this the way the present jury box is made up in your county?

THE WITNESS: Yes sir.

MR. COATES: Your Honor—

THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.

MR. COATES: Your Honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury commissioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

MR. COATES: No further questions. I'm sorry—excuse me.

Q MR. COATES: Mr. Dennis, is this exhibit a copy of the memo that was received from the solicitor's office?

A Yes, it is.

MR. COATES: No further questions.

THE COURT: All right, you gentlemen want to examine the witness?

BY MR. VEAL:

Q Mr. Dennis, how long have you been clerk?

A 18 years.

Q Have you ever known any black to be denied entrance into your office?

A No sir.

Q Had any trouble coming into your office or any office in the courthouse?

A No sir.

Q Or in any election which you might have had occasion to observe?

A No sir.

MR. VEAL: That's all.

THE COURT: Any other questions? All right, call your next witness.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP, WARDEN

EXCERPT FROM PETITIONER'S SUPPLEMENTAL BRIEF ON DIRECT APPEAL AT 1-7

This supplemental brief, filed to aid the court in consideration of this error, is authorized under Rule 17 of the Honorable Court and by leave of Court during oral arguments on January 15, 1979.

COUNT FOUR (A)

THE JURY LIST AND BOX FROM WHICH DEFENDANT'S JURY WAS DRAWN WAS UNCONSTITUTIONAL AS A MATTER OF FACT AND LAW.

The jury list and box from which the jury in this case was drawn was found to be unconstitutionally composed as a matter of fact and law by the Middle District Court of Georgia in the case of *Willie Bailey, et Al vs. Roy L. Vining, et Al*, Georgia No. 76-199-MAC. This defect was a matter of violation of the Georgia statute law (Ga. Code Ann. §59-108) as well as a violation of United States Supreme Court Decisions.

Attached to this supplemental brief is exhibit "A" which is the order of the Court in the above cited case as well as a transcript of the applicable portion of the evidentiary hearing, as exhibit "B".

The conclusion of this case is clear. The jury source was tainted as the list and box were not constitutionally valid.

The Court found in this case that there had been intentional underrepresentation of Blacks and women which amounted to systematic exclusion of discrete groups in the community.

The Federal Court received in evidence a memo written by the prosecutor's office of Putnam County. This handwritten memorandum, attached as a part of Exhibit "B" instructed the jury commissioners to put numbers of Blacks on an underrepresented basis, but within the guidelines set by the case of *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1964), which held that 10% disparity was not enough to make out a prima facie case on percentages alone and the case of *Prestone v. Mandeville* 428 F.2d 1392 (5th Cir.) (1970) which held that 14% was enough to make out a case. The handwritten memo, it is clear, puts the prearrayed figure in this range. The result is a list which is not representative, but would discourage or prevent jury challenges.

While this procedure was an ingenious method of underrepresenting women, Blacks and youth by purposeful selection on the part of the State and the jury commissioners, it denies the defendant the right to be judged by a jury of his peers.

The concept of the right to be judged by a jury of one's peers is as old as the *Magna Carta*. ". . . peers of a Crown Tenant were his fellow Crown Tenants." W. McKenzie, Magna Carta 379 (2nd Ed.) Chapter 39. The concept has been a continuing and refining element of American law. The United States Supreme Court, in 1880, defined the fundamental nature the right in the case of *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 665 (1880). The Court stated, "The very idea of a jury in a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine: that is, of his neighbors, fellow associates, persons having the same legal status in society as that which he holds."

It is now clear in the law that to determine if a jury is a constitutionally acceptable cross-section of the community, or a jury of the defendant's peers, they must look beyond facially valid statutes and inquire into the practices of jury commissioners in order to assure itself that the Constitution was not being subverted. (*Neal v. Delaware*, 103 U.S. 370, *Martin v. Texas*, 200 U.S. 316, *Brownfield v. South Carolina*, 189 U.S. 426, *Smith v. Mississippi*, 162 U.S. 592). *Whitus v. Georgia*, 385 U.S. 545, 551, 87 S. Ct. 643, 17 L.Ed. 2d 599, (1967) and *Castenada v. Partida*, 430 U.S. 482, 97 S. Ct. 127, 51 L. Ed. 2d 498 (1977).

The fact that the defendant was not a minority person or among the class of persons underrepresented on the jury, does not diminish his right to have a constitutionally acceptable cross-section of the community as the jury list *Taylor v. Louisiana*, 419 U.S. 522, 42 L.2d 2d 690, 95 S. Ct. (1975).

As the Middle District Court found in the *Bailey* case, the memo which projected the lowest number of Blacks, women and youth that could be placed on the jury in order to "get by," was evidence of discrimination. (See attached order of the Court). The further conclusion of the Court was that the jury list could not be used to provide jurors for any further criminal trials.

COUNT FOUR (B)

THERE WAS NO WAIVER OF DEFENDANT'S RIGHT TO A CONSTITUTIONALLY COMPOSED JURY BECAUSE THERE WAS NO OPPORTUNITY TO DISCOVER THE PURPOSEFUL DISCRIMINATION.

The Georgia Courts have recently taken a strict line on the timing of challenges to the jury *Anderson v. State*, 233 GA 174, 154 S.E. 2d 246 (1967). The Georgia Supreme Court has held that if the defendant is represented by counsel at the committal hearing and does not raise

the grand jury issue before indictment it is deemed waived, *Hager v. State*, 138 Ga. App. 666, *Mehan v. Statem* 232 Ga. 470, 471(2), 207 S.E. 2d 457 (1974), *Scott v. State*, 121 Ga. App. 458.

The various cases in the Georgia Court of Appeals and the Georgia Supreme Court decided after 1968 were decided on the same analysis of *Anderson* even though *Anderson* was reversed by the United States Supreme Court in 1968. See *Anderson v. Georgia*, 390 U.S. 206, 19 L. Ed. 1039, 88 S. Ct. 902 (1968). The Supreme Court simply reversed the Georgia Supreme Court citing *Whitus v. Georgia* 385 U.S. 545, 17 L. Ed. 2d 599, 87 S. Ct. 643. While the *Whitus* case reversed two Georgia convictions on *both* grand jury and and traverse jury issues there was not a clear ruling on the issue of waiver by untimeliness. The status of Georgia law on timeliness and waiver seems to be unclear in that the *Anderson* case was reversed, but there is no specific language relating to waiver.

The law is clear, however, that failure to timely raise the objection may be deemed not a waiver under special circumstances. In *Barrow v. State*, 239 GA 162(1) (1977) the Court stated:

> "Barrow was indicted on April 21, 1975. Although he was represented by counsel from February 11, 1975, no motion was made regarding the composition of the grand jury. Barrow was tried, convicted and given the death sentence for murder, but his conviction was overturned by this court and sent back for a new trial. *Barrow v. State*, 235 GA 635 (221 S.E. 2d 416) (1975). Barrow then filed his challenge to the grand jury, which the trial court overruled as not timely. We, however, because of the special facts of this case, reverse the trial court on this point."
>
> "The general gule is that the grand jury composition must be challenged prior to indictment unless

the defendant shows he had no actual or constructive notice of the illegality. *Sanders v. State*, 235 GA 425(219 S.E. 768)(1975); *McHan v. State*, 232 GA 470(207 S.E. 2d 457)(1974); *Williams v. State*, 210 GA 665(82 S.E. 2d 217)(1954). Failure to do so is deemed a waiver. *Cobb v. State*, 218 GA 10 (126 S.E.2d 231)(1962). Under these general rules Barrow's challenge would indeed have been filed too late."

"We have also said, however, that 'it is a lawyer's proper function and duty to determine whether it is to the interest of his client to raise the issue of systematic exclusion. *Cobb v. State*, 218 GA 10, 24(6)(126 S.E. 2d 231)(1962).' *Burkes v. Whitley*, 221 GA 108, 109(143 S.E. 2d 171)(1965). In his testimony at the hearing on Barrow's motions, the public defender, who had represented Barrow at his first trial, made very clear that he had not considered making such a challenge, even though he realized under our cases he probably would have been successful."

While the *Barrow* case mixes the question of effective assistance of counsel with the timeliness and waiver issue the relevance of the case to the case *sub judice* is clear. 1) The rule that a challenge to grand jury must be made prior to indictment is a general, and not absolute rule. 2) Lack of notice is an exception. In this case the screw turns in a different way. Here the lawyers, no matter how effective, could not have known of this insidious defect in the jury selection process until it was unearthed in the Federal proceedings. The lawyers raised the issue in the trial court below by way of Notice of Appeal and Enumeration of Error, *at the earliest possible time after notice of the defect.*

The above analysis would as well apply to the timeliness question of a challenge to the array of the trial jury under Georgia Code Section 59-803, *Bryan v. State*,

124 GA 79, 80, 52 S.E. 298 (1905), *Williams v. State*, 31 Ga. App. 173(3), 120 S.E. 131 (1923).

Specifically, the reason that the defendant's lawyers could not have known of this defect was that an examination of the statistics on the representation of various cases would not have lead the lawyers to conclude that a *prima facie* case on the percentage disparity could be made out. In fact this was the apparent purpose of the memo. Further, there was available to the defense counsel no means to discover this unofficial directive or memo which was not a part of the public record.

Therefore, there was no notice of the actual defect and no means to discover it which means that it would have been impossible to discover the defect before trial. To conclude otherwise would put an ornerous and perhaps impossible task on defense counsel and the Court. The conclusion that it *might have been* possible for defense counsel to discover this in a hearing would put defense counsel in the position of having to bring a jury challenge in every case would conduct a full hearing and examine every person connected with the jury selection process including the District Attorney, his staff, the Judge who drew the jury and a host of other court personnel.

The burden placed on the defendant unrepresented by counsel by such a conclusion is obvious. Even when represented by counsel, the defendant cannot rely on the failure of his lawyer to raise such claims to be available in *Habeas Corpus*. *Durham v. State*, 239 GA 697, 701 (6) (1977).

If defense counsel and defendant are deemed to have waived such a hidden issue by failure to timely raise such issues, the increased burden on the administration of justice is obvious.

A persuasive holding on the relationship of timing and the concern for orderly administration of justice is found in *New York v. Attica Brothers*, 359 N.Y. S. 2d 699.

"The cases, however, leave no doubt that a defendant's constitutional and common law right to a trial by a jury of his peers and to the equal protection of the laws under the Fourteenth Amendment create, as an essential corollary, the right to assert the failure of those charged with the jury selection process to comply with the Constitutional guarantee and all State statutes, rules and regulations enacted to implement it."

"The objections to the timeliness of the motion and to the lack of statutory authority for its initiation must yield to the overriding consideration that a present resolution of this question is necessary for the orderly administration of justice."

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(Title Omitted in Printing)

TESTIMONY OF WILLIAM A. PRIOR

[Transcript of November 15, 1985 Hearing at 7-21]

Q Your Honor, would you state your name for the record, please?

A William A. Prior.

Q And what profession are you in?

A I'm Superior Court Judge for the State of Georgia.

Q And how long have you held that position?

A Approximately four and a half years.

Q And prior to that, where did you practice law?

A I practiced law in Madison, Georgia and the surrounding counties.

Q Have you ever represented criminal defendants in the Superior Court of Putnam County, Georgia?

A Yes, I have on a good many occasions.

Q And did you represent the Petitioner in this Federal Habeas Corpus action, Mr. Amadeo?

A In the Federal Habeas Corpus action?

Q No. The Petitioner in this action, did you represent him at trial?

A Yes, I did. Mr. E. R. Lambert and I were appointed by Judge Joseph Duke to represent him.

Q I realize it's been quite some time but do you recall when in the course of the proceedings you were appointed to represent Mr. Amadeo?

A As I recall, the incident happened on the 29th of September and I would say, we were appointed no more than four days later so somewhere early in October, I was appointed and started to prepare the case.

Q Were both you and Mr. Lambert appointed at the same time?

A Yes, we were.

Q In preparing for trial, did you consider filing any types of motions to challenge the Grand or Traverse Juries in Putnam County?

A Yes, we did. We filed numerous motions; I don't recall all the motions we filed but we filed numerous motions. We filed a Motion in Limine trying to get the Judge not to let the District Attorney to introduce evidence of other crimes; there'd been some other incidents and we anticipated that he would attempt to introduce those as showing motive and identity and that type of thing. We filed that motion that I specifically recall. We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a list of the jurors and we met with an attorney in Putnam County who'd been there for many years, Mr. Dallas Veal. We knew—personally knew or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse Jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item, we decided not to file a challenge. The reason being that we frankly thought that if we filed it in one, we could wind up in worse shape than we were. There were certain people on the Jury that we thought that would be favorable to us on the panel. So, all things considered, we did consider it, and decided not to file.

Q Did Mr. Veal ever become a formal member of the trial team for Mr. Amadeo?

A No, he did not. I don't even think he sat with us during the Jury selection process, although I'm not certain about that.

Q In meeting with Mr. Veal, what, if any, discussions did you have about the number of black people or women that were on the list that you looked at?

A Well, I don't recall whether we had a conversation in regard to the numbers that were on there but—

THE COURT: Let's bear in mind that Mr. Veal is deceased, isn't he?

WITNESS PRIOR: Yes sir.

MS. BOLEYN: Yes sir, he is.

THE COURT: Does that inhibit this line of questioning?

MS. BOLEYN: Perhaps Your Honor, I'll just rephrase my question.

Q MS. BOLEYN: What, if any, consideration did you give to the Jury list as far as determining numbers of black people or women on that list?

A We identified on the Jury List each juror, prior to trial, in regard to whether they were black or white so we knew the actual numbers on the Traverse List, who was black and who was white and as I recall that, they were approximately evenly divided.

THE COURT: Now, you're talking about the array?

WITNESS PRIOR: Yes sir, the array.

THE COURT: You're not talking about the Master Jury List, are you?

WITNESS PRIOR: No sir, we're talking about the array that was put on us for that trial, as I recall, there was something like 120 jurors, maybe 110 jurors.

Q MS. BOLEYN: What, if any, investigation did you do with reference to the Jury Pool versus the people in the population, the black population and white population with reference to the Jury Pool itself as opposed to the array?

A To determine whether or not we were likely to win a challenge to the array?

Q Yes.

A I don't recall that we did any specific—the main investigation that I recall is our long discussions with Mr. Veal and other people in the county as to individual jurors. 'Do you know this person? Tell us about this person. What does this person do? Is this person black or white? How long has this person been in the county?

Does this person have any connection in any way with the victim?' That type of thing.

Q Did you make any compilation of the percentages, either on the array or in the Jury Pool with reference to black people or women?

A Again, we identified each person as man, woman, black, white and I recall—I think I recall that on that particular array; that is, that 110 or 120 jurors, the black/white situation was approximately even. There were numerous women. I don't remember the percentage. I do not recall being aware of the exact percentage of the black population of Putnam County and whether the entire Master Jury List would have met that—the requirements of that. Probably not and I probably was aware of that but I guess the point I want to make is that I did consider—Mr. Lambert and I did consider challenging the array and it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a Jury List as we could get. We were aware of the fact that the District Attorney was likely to be able to introduce other crimes and these other crimes involved the white defendants, all of whom were white, Mr. Amadeo, Mr. Colter and Mr. Conwall assaulting black victims; that is, in Alabama where allegedly another victim had been killed and in, I believe, Mississippi, where another victim had been assaulted and not killed but left in pretty bad shape and we were somewhat concerned about black members of the Jury or a heavily black Jury from that standpoint. I'm not certain of the actual racial makeup of the twelve member Jury. As I recall though, it was approximately evenly divided.

Q What, if any, knowledge did you have at the time that you represented Mr. Amadeo of prior Jury challenges to the Putnam County Master Jury List?

A I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware

that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would've been one, if it had been instituted. I can't say that; I can say that I had a general knowledge of that area of the state at the time and if you had asked me to guess, I probably would've told you that it would not have met the required percentages but I can't specifically say that; I can't specifically say that I keyed on that or that that was the basis of my decision. The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were. There were several factors; I don't think I mentioned the religious factor. There was at that time in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "Shepard" was in it somewhere, I think, but at any rate, it was very active, had a relatively large following in Putnam County and several of these people had visited the defendants in jail and we knew there were several people on that particular 110 or 120-person panel who were involved in that and that was another reason for thinking we were doing about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

Q Did you discuss your tactical decision in that regard with Mr. Amadeo?

A I don't recall whether we did or not. In general, we discussed our thoughts with Mr. Amadeo and asked for his thoughts and I cannot specifically say I remember discussing or not discussing whether to challenge the array and I'm sure we didn't discuss every tactical decision we made during the course of the preparation for the trial or the trial itself with Mr. Amadeo or the other defendants.

Q At the time of your representation of Mr. Amadeo, what, if any, knowledge did you have, Judge Prior, with reference to a memorandum that was apparently written by someone in the Assistant Solicitor or Assistant District

Attorney's Office to the Jury Commissioners concerning the percentages of blacks and women to be included on the Master Jury List?

A I assume you're referring to the memo that played a part in the case of *Bailey vs. Vining*, which happened after this trial took place. I do not recall having any knowledge of that memo at that time, although at a later time and prior to the time we instituted the appeal in this case, Mr. Lambert and I represented Mr. Amadeo on the initial appeal to the Georgia Supreme Court, we did become aware of it and did put that as one of our errors in the appeal. At that time, frankly speaking again, we wanted everything we could get in the appeal. We had lost in Mr. Amadeo's case and we wanted to raise every issue we could raise and we did raise that issue on appeal but that probably was the first time I had any knowledge; I certainly do not remember being aware of any memo at the time of this trial.

Q Judge Prior, do you have any more specific recollection of when between his conviction and his appeal, you might've become aware of the memo?

A No, I don't. I do recall that we filed a motion for new trial, which is the normal practice in Georgia, as I'm sure you know, and the transcript probably didn't—we probably didn't get the transcript for six or seven months; it was a long transcript, relatively long, but somewhere in that time period, the time period between the end of the trial and the filing of the appeal, we were aware of the *Bailey vs. Vining* case and we did mention that in one of the enumerated errors, Number Four, as I recall, although I'm not sure of that.

Q When did your representation of Mr. Amadeo end?

A At the time we received the remittitur from the Georgia Supreme Court denying the appeal.

Q And you and Mr. Lambert both participated on appeal in writing the brief?

A We both participated in writing the brief; we both appeared in the Supreme Court and argued the case.

MS. BOLEYN: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. WARNER:

Q Judge Prior, you talked with Dallas Veal, who is now deceased, during 1977 before trial, is that right, sir?

A That's correct, on several occasions, one of which was a lengthy discussion where we went over the Jury List item by item.

Q What you had—excuse me, sir.

A Excuse me, go ahead.

Q What you had at that time was a list of the venire, is that right?

A That's correct.

Q And Mr. Veal never mentioned anything to you about any memo from the DA's Office that was brought up on direct, did he?

A Not that I recall, no sir.

THE COURT: You all might want to perfect the record to show that Mr. Veal was an individual attorney practicing law by himself in this community and as far as I know, with no connection to the District Attorney's Office, then called the Solicitor's Office. That's right, isn't it?

WITNESS PRIOR: That is correct, yes sir. He may have—I don't recall whether his step-son, Don Huskins, was with him at that time or not; he may or may not have been but he had no connection whatsoever, to my knowledge, with the District Attorney's Office or the County; I don't think he ever represented the County.

Q MR. WARNER: He did represent the City of Eatonton, is that correct?

A Correct, yes.

Q And as a matter of fact, he was one of the attorneys in the *Willie Bailey* case, right, that represented one of the defendants?

A I'm certain he did. I vaguely remember that; I'm sure he did though. He was the City Attorney down there for years.

MR. WARNER: Your Honor, I would like two exhibits marked as Petitioner's Exhibit 1 and 2, if I could, please sir.

Q MR. WARNER: Judge, as a part of your representation of Mr. Amadeo, you filed various pre-trial motions. You already mentioned a Motion in Limine to try to keep out other crimes, evidence, is that right?

A That's correct.

Q And you also filed a motion for a continuance?

A Yes sir, we did.

Q And a motion for a change of venue, is that correct?

A That's correct, and I think some other motions although I don't recall specifically what.

THE COURT: Excuse me for interrupting you all. I'm looking at the docket sheet in *Bailey v. Vining*. Mr. Veal's son-in-law, Donald Huskins, is shown as the attorney for the Defendants Marshall, Vining, Ridley, Culver, Holley, Winslette, Lynch and Cunningham and also for the Defendant Tax Assessors. And I seem to recall that in that capacity that Mr. Veal came with Mr. Huskins; I'm not sure.

WITNESS PRIOR: He may have, Judge, I don't remember that; I don't recall.

THE COURT: I'm just going by the docket sheet.

Q MR. WARNER: Judge Prior, I show you what I've marked as Plaintiff's Exhibit No. 1 and ask you if you can identify that document. I think the first page is just a certification from the Putnam County Superior Court.

A Yes, I identify Plaintiff's Exhibit 1 as a copy of a Motion for Change of Venue filed in the case of the *State vs. Tony B. Amadeo, William S. Conwall, David L. Colter*, Putnam Superior Court by myself and Mr. Lambert.

Q And I'll show you in the same regard Plaintiff's Exhibit No.—Petitioner's Exhibit No. 2 and ask you if you can identify that, please sir.

A Yes. I identify Plaintiff's or Petitioner's Exhibit 2 as a copy of a Motion for Continuance filed by Mr. Lambert and myself in the same case with an Affidavit in Support of the Motion attached.

Q Judge, at this particular point in time, you tied in, meaning during the course of the pre-trial motions, you tied in the Motion for Continuance with the Change of Venue, is that correct, both of them related to passions that were inflamed in the community, that you were requesting a time in March of 1978 for trial, at which time you felt like the passions of the community and so forth would calm down, is that correct? That was one of your considerations?

A Yes, it was.

Q Now, Judge Duke, as a matter of fact, did not rule on these motions—I believe he ruled on the Motion for Continuance prior to trial, is that correct?

A That's my memory. My memory is that he denied the Motion for Continuance but reserved ruling on the Motion for Change of Venue until such time as the Voir Dire had been completed or at least had gotten far enough along to determine whether we were going to be able to select a Jury.

Q So that the Motion for Continuance was denied prior to trial but the Motion for the Change of Venue continued until after Voir Dire was over with, is that correct?

A That's my memory, yes sir.

MR. WARNER: No further questions, Your Honor.

THE COURT: Ms. Boleyn?

MS. BOLEYN: Nothing further, Your Honor.

THE COURT: Judge, as of the *Amadeo* trial, to your memory, had any lawyer practicing in this eight-county circuit ever challenged the composition of the Master Jury List in any county, of the circuit, I mean?

WITNESS PRIOR: Judge, I'm giving you—I'm responding to that and I want to tell you I'm not certain of the answer; I'm not certain of the county. My memory is that one had, although I can't tell you where or who.

THE COURT: In another county?

WITNESS PRIOR: In another county. That's a general answer but that's the best I can do on that.

THE COURT: What was known to you and/or Mr. Lambert and discussed between you all that caused you to consider challenging the Jury List for this county?

WITNESS PRIOR: Well, as I recall, the—and again, I'm having to kind of reconstruct something that happened a good while ago. We considered challenging it and thought we would win if we challenged it.

THE COURT: But I mean what led you to believe you would win if you challenged, that's what?

WITNESS PRIOR: I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know—I don't think we had any investigation to back that up. I think we just generally thought that and our thinking was, 'Well, if we do, we'll gain the benefit of a delay if we win, assuming we win because they'll have to redo the Jury Box and we'll have to draw another Jury and at least we'll get a delay.' On the other hand, we had already been through these jurors that we had one at a time and we knew or we thought we knew what we had there and we balanced those two factors and decided not to.

THE COURT: Any questions on account of the Court's questions, either one of you?

MR. WARNER: No, Your Honor.

THE COURT: Thank you very much. Any reason the Judge can't be excused?

MS. BOLEYN: Not from the Respondent, Your Honor.

MR. WARNER: There's not any with us, Your Honor.

THE COURT: All right. If you wish to leave, you may do so or we'll be glad to have you stay. Mr. Warner, call your first witness.

MR. WARNER: Judge, I would call, hopefully just briefly, Mr. E. R. Lambert to the stand.

THE COURT: Incidentally, also while we're getting the chronology straight, the docket sheet in *Bailey v. Vining* shows that only after the hearing in question commenced were the Jury Commissioners added as parties. They were added on the 17th of August after the hearing had commenced on the 15th. Come around and have a seat, Mr. Lambert.

TESTIMONY OF E.R. LAMBERT

[Transcript of November 15, 1985 Hearing at 22-36]

Q Would you state your name and address for the record, please sir?

A E. R. Lambert. I live in Madison, Georgia on North Main Street.

Q What is your occupation, Mr. Lambert?

A I practice law there in Madison.

Q And how long have you so practiced law there?

A Since September of 1950, about thirty-five years.

Q As a part of your practice, did you have occasion to represent people all over the Ocmulgee Circuit, including Putnam County?

A Yes.

Q Back in 1977, were you appointed to Mr. Tony Amadeo's case in Putnam County by Judge Duke?

A I was.

Q And when did you begin to represent him, if you can recall specifically, Mr. Lambert?

A To my recollection, it seemed that the incident happened in September of that year and we were appointed shortly thereafter and Mr. W. A. Prior and I both were appointed to that case and we went immediately to work on it and had numbers of conferences with Mr. Amadeo and his two companions.

Q Now, as a part of your representation of Mr. Amadeo, did you talk with anyone regarding the venire list in Putnam County, Georgia?

A Yes.

Q And who was that, please?

A We possibly talked to several lawyers there but I remember distinctly talking to Mr. Dallas Veal, an older lawyer there who'd been in Putnam County for a number of years.

Q And you filed various pre-trial motions in defense of your client before trial, didn't you, sir?

A We did; we filed a Motion for Change of Venue and Motion in Limine and one or two other motions.

Q Did you file a Motion to Continue—for a Continuance, was that one of the motions you filed?

A I don't recollect but I'm sure we did. We tried to file everything we could think of.

Q Cause you were interested in representing Mr. Amadeo well and helping him; you had a difficult case, is that right?

A Yes sir.

Q I show you, Mr. Lambert, what's been marked as Plaintiff's Exhibit No. 1 and tell you to look over that and ask you if you can identify it.

A Yes sir.

Q What is that, please 'sir? What does that purport to be?

A That's a Motion for a Change of Venue.

Q I'll show you what's been marked as Petitioner's Exhibit No. 2 and ask you if you can identify that, please sir.

A Yes, that's the Motion for Continuance.

Q And that was filed by you and now Judge Prior, is that correct?

A Yes sir.

Q Now, after Mr. Amadeo was convicted and given the death penalty, you continued to represent him for a time after trial, is that correct?

A A short period of time, yes.

Q And I believe you filed his direct appeal in the Georgia Supreme Court, is that correct?

A Yes sir, that's my recollection.

Q And as a part of that appeal, you filed an original Enumeration of Errors, a Brief and then you filed a Supplemental Brief, is that correct?

A Yes sir.

Q And the Supplemental Brief, what did it deal with? Did it deal with the Jury issue?

A It dealt with about three or four issues and my recollection is we brought up the Jury question at that time, yes sir.

Q Mr. Lambert, I'll show you what's been marked as Petitioner's Exhibit No. 3 and see if you can identify those documents. It's a composite document of three different things so take your time and look through it and see if you can identify them, please sir.

A Yes sir.

Q What are those documents, please sir, if you could identify them for the record, please?

A Well, it's a Brief of the Appellate and, of course, it follows the usual form where there is a statement of the case and then the enumeration of errors and argument and then there's a Supplemental Brief also in here, yes sir.

Q What does the Supplemental Brief deal exclusively with?

A I believe it dealt exclusively with the Jury List and Box which the defendants' Jury was drawn.

Q Are there attachments and appendices at the end of that particular Supplemental Brief?

A Yes sir.

Q Are they a part of the transcript and record in the *Willie Bailey* case?

A Yes sir.

Q And I believe as a part of the Supplemental Brief, you maintained that there was no notice of the actual defect and no means to discover it, which means that it would've been impossible to discover the defect before trial, is that what is in your brief specifically on Page Six of the Supplemental Brief?

A What was the question again?

Q Did you mention specifically on Page Six, using this direct language in your Supplemental Brief, "Therefore, there was no notice of the actual defect and no means to discover it," which means that it would have been impossible to discover the defect before trial. Is that what you put in your Brief?

A That's what was—what's in the Brief, yes sir.

Q And that's what you and Judge Prior filed in Georgia Supreme Court, is that right?

A Yes sir.

Q And you well intended what you put in that Brief, didn't you?

A Yes sir. Of course, at that time, you know, the trial was over and we were reaching for straws and doing everything we could to try to follow through.

Q So, if you would've had it to do over again, you would've challenged his array, wouldn't you, according to what you've said there in the Brief?

A Oh, according to what I said in the Brief—

MS. BOLEYN: I object to the question. I don't think it's a question of whether or not he would do it now. The question is did he know and make a conscious decision then. What he found out afterwards, he did the best he could.

THE COURT: Well, it seems to be undisputed that neither Mr. Prior nor Mr. Lambert were aware of the memo from the District Attorney's Office which caused this Court to throw out the Jury Box and further seems to be undisputed that they didn't challenge the Jury in this case so beyond that, I guess this Court will have to draw its conclusion, won't it?

MR. WARNER: Yes sir, Your Honor. Just one thing further.

Q MR. WARNER: Now, when you had talked to Dallas Veal, he of course didn't know anything about this memo cause it hadn't happened, is that right? The *Bailey* case hadn't happened?

A He certainly didn't tell us about it if he knew about it, no.

MR. WARNER: Thank you, sir. He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Mr. Lambert, do you recall more specifically when you might've found out about the memo from the Assistant Solicitor that became the subject of the *Bailey v. Vining* case in relation to the end of Mr. Amadeo's trial and the filing of the appeal?

A My recollection is that—of course, this case was tried in 1977 and it was way up in '78 or in '78 sometime after the—I remembert hearing some discussion about the Jury down in Putnam County since I visited that county quite often but it was up in '78 sometime. I don't remember when, no.

Q And you don't recall how you actually received word that the memo existed?

A No, it was generally discussed with the lawyers in the Circuit, if I recollect correctly.

Q And prior to the time that you represented Mr. Amadeo, did you have knowledge whether or not any other successful or unsuccessful jury challenges had been made in Putnam County specifically?

A No ma'am, there were none to my knowledge.

Q And did you practice at the time that you represented Mr. Amadeo in any of the other counties in the Circuit?

A Yes ma'am, pretty much generally in—usually don't get down to Wilkinson County much but I do from as far as Baldwin County.

Q And were you aware whether there were jury challenges either successful or unsuccessful in any of the other counties in the Circuit?

A I was not aware of it.

Q Did you have an opportunity to look at the Master Jury List as opposed to just the Jury Pool for that particular case in making your decision about whether or not to file a jury challenge, if you recall?

A Not the Master Jury List. Of course, we were furnished with just a Jury List. I have my notes here, just a regular Traverse List that was published several weeks probably before the trial and we normally take that, I do, and study it. The marks on there, Judge, were put there by me now.

THE COURT: Oh yes sir, I realize that.

Q MS. BOLEYN: Were you finished? You did not review the Master Jury List if you recall?

A No ma'am. This is the only Jury List we had.

Q On that Jury List that you had, did you make an attempt to find out how many black people were on that list and how many women were on that list?

A Yes ma'am.

Q And how did you go about determining the race or sex of the people on the—

A Well, you can usually tell by the name whether it's male or female, if it's a Mrs., some—the list shows Mrs. before some names and then others, for instance, has Elizabeth somebody and doesn't have a Mrs. but I would assume that was a woman. And then we, in counseling with Mr. Veal, we determined what job people had and what race they were and other significant factors that we thought would be important.

Q And what was your overall impression of the actual Jury List you reviewed as to whether or not it would be a Jury that might or might not be beneficial to Mr. Amadeo?

A Well, we knew we had a tough case but we felt very comfortable with the Jury after reviewing with Mr. Veal some people that we felt was, you know, would not be so wanting to give the death penalty.

Q Did you make any attempt to make any type of statistical analysis of the list that you had as far as how many black people were on there or white people or women?

A No ma'am.

MS. BOLEYN: Nothing further, Your Honor
THE COURT: Mr. Warner?

REDIRECT EXAMINATION

BY MR. WARNER:

Q Just a few further questions, Mr. Lambert. From what Ms. Boleyn was asking you about when you thought you recalled anything in regard to this memo, do you ever recall after the trial of this case, meaning Amadeo's trial in 1977, do you ever recall sometime between there and the end of 1978 having a discussion with Mr. Chris Coates, who was a plaintiff's attorney in the *Willie Bailey* case about the juries in Putnam County but before your direct appeal?

A I was involved in some litigation, I represent the City and we were involved with some litigation that the City was a party to the lawsuit, and Mr. Coates was in Madison quite frequently and in my office quite frequently, and we had talked about the case and I could very easily have discussed this with Mr. Coates. I don't remember the specific instance but along about that time, Mr. Coates and I were talking on the telephone and talking in person and working on this litigation there in Madison.

Q Did you have any discussion with Mr. Nelson Jernigan in regard to this jury issue insofar as preparing for your appeal?

A Yes sir, I did. Nelson Jernigan and I were close friends and had worked together in the Georgia Legislature and I knew of his having some experience in appeals of this type and I did confer with him.

Q You got his input insofar as investigation and facts and law is concerned on the jury issue, is that correct?

A I did.

MS. BOLEYN: Nothing further.

THE COURT: Mr. Lambert, getting back to the discussion that you described among the members of the Bar as to the memorandum from the Solicitor's Office, did that discussion arise after the hearing in this United States Court and the Court ordered revision of the Jury Box?

WITNESS LAMBERT: Judge, it happened after the trial of this case, I'm certain now; whether it happened after the—your decision in the other case in Putnam County, I'm not sure. It seems to me—

THE COURT: What else to your memory could have caused knowledge of the—

WITNESS LAMBERT: Nothing—nothing that I know of. I certainly didn't know about the memorandum, Judge, at any time until way after the case was tried in Putnam County, the '78 case, which is *Bailey vs.*—

THE COURT: Yes sir, *Bailey v. Vining*. In other words, the transcript in this Court shows a hearing took place August 15th through the 17th in 1978.

WITNESS LAMBERT: The *Bailey* case?

THE COURT: The *Bailey* case.

WITNESS LAMBERT: Yes sir. It had to be after that, Judge, in my opinion. Yes, I can't remember for sure but I would certainly hazard a guess to that.

THE COURT: What type of law practice were you personally engaged in at the time you were appointed to represent the Petitioner?

WITNESS LAMBERT: Well, Judge, it's a general country law practice. We do civil work, corporate work; we do criminal work. We do most everything walks in the front door.

THE COURT: Were you a sole practitioner or you—

WITNESS LAMBERT: No sir, I had a partner at that time, Mr. Carter was with me but he did not get involved in this case. He was watching the home fires trying to keep the wolf away back there at the office.

THE COURT: What was the compensation that you and Mr. Prior received for representing Mr. Amadeo under the State system at that time? Was it still $100?

WITNESS LAMBERT: No sir. Judge, it seems to me like Judge Duke gave us a little more than that but it wasn't much. I don't remember exactly what but he—we felt that it was not generous but we felt that—it was more than $100 but I really don't remember; honestly, I don't.

THE COURT: Anyway, under the—I'm just trying to get the facts.

THE WITNESS: Yes sir, I understand.

THE COURT: My recollection from having been a practitioner is coming back, but generally, under our State system, the compensation paid any court-appointed counsel in a capital case in '77 was very nominal, wasn't it?

WITNESS LAMBERT: We had some kind of Bar Association rule and maybe it was $250 or something like that but it seems that because this took an extraordinary amount of time, the Judge gave us a little bit more than that but not much but the standard rule is usually a felony case is so many dollars, misdemeanor so many dollars and we still use that in the Ocmulgee Circuit, yes sir.

THE COURT: Again, I'm not trying to embarrass you or put you on the spot but I must be honest with the record. Would it be fair to say that back in 1977 that lawyers engaged in a country practice in the local community generally hesitated to challenge the Jury List in these rural counties?

WITNESS LAMBERT: Judge, I'd never heard of it and wouldn't have done it, you know. Yes, we would hesitate considerably to do that in a country court. I just—it was very unusual.

THE COURT: Were you nevertheless though aware of the Supreme Court of the United States decisions in like *Whitus v. Georgia* and—

WITNESS LAMBERT: Yes sir.

THE COURT: You knew about that?

WITNESS LAMBERT: I certainly did, yes sir.

THE COURT: Were you aware of the Bibb County Jury Box having been thrown out by the Supreme Court of the United States?

WITNESS LAMBERT: I'm sure I read about it, Judge. I don't remember the date of that, whether it was prior to '77 but it must've been, yes sir; I think it was.

THE COURT: Well, it's *Alexander David Jones vs. Georgia* is the name of the case. I was his lawyer.

WITNESS LAMBERT: Yes sir, I remember the case.

THE COURT: Do you remember that?

WITNESS LAMBERT: Yes sir.

THE COURT: What led you to believe that you ought to even think about challenging the Jury List of this county?

WITNESS LAMBERT: The fact of the *Bailey* case, Judge, I think is the only—

THE COURT: No, I mean—this *Bailey* happened after.

WITNESS LAMBERT: Afterwards, I know, but I thought you were talking about in the appeal. We brought it up in the appeal.

THE COURT: No, I'm talking about at the time that you represented him and were filing motions, what led you to even think about the Master Jury List is what I'm interested in.

WITNESS LAMBERT: Other than these cases that you've mentioned and the fact that lawyers were concerned and interested that that had happened in Georgia and we considered it at the time, I'm sure, Judge, but we felt very comfortable with this Jury. It was about —my recollection it was six blacks and six whites and probably more female than male; it was eight or nine females and we felt like here's a young eighteen-year old boy that we could get a mother on there, she might be

more lenient than somebody that's some hard dairyman. This man that was killed was a dairyman and we stayed away from dairymen altogether, I remember that.

Q THE COURT: I see. What was the ratio composition of the Jury that actually served?

WITNESS LAMBERT: Six and six, six blacks and six whites.

THE COURT: I see. And the men and women?

WITNESS LAMBERT: Either eight or nine women and either three or four men.

THE COURT: Any questions on account of the Court's questions?

MR. WARNER: No, Your Honor.

THE COURT: All right. Thank you very much, Mr. Lambert.

MS. BOLEYN: He can be excused so far as the Respondent's concerned, Your Honor.

MR. WARNER: And so far as the Petitioner also, Your Honor.

THE COURT: Yes sir. You may be excused, sir. Thank you. Call your next witness, Mr. Warner.

TESTIMONY OF CHRISTOPHER COATES

[Transcript of November 15, 1985 Hearing at 37-53]

BY MR. WARNER:

Q For the record, would you state your name and address, please sir?

A My name is Chris Coates and I live at 124 North Point Road in Milledgeville, Georgia.

Q What do you do for a living, Mr. Coates?

A I'm an attorney. I'm in private practice in the law firm of Mathis and Coates.

Q How long have you practiced law in the State of Georgia?

A I moved to Georgia in July of 1976 and I was admitted to practice before the courts of Georgia in 1977 and I have practiced in Georgia since that time.

Q During 1978, did you have occasion to represent the plaintiffs in the *Willie Bailey vs. Roy L. Vining* case which was tried here before this Court in the Middle District of Georgia?

A Yes, I did.

Q And can you tell, just for the record, what the nature of that case was, Mr. Coates?

A Yes sir. Initially when the case was filed, it involved claims against the at large voting procedures for the Eatonton City Council and the Board of Commissioners and the Board of Education for Putnam County. During the course of the litigation, the case also came to include challenges to the Grand and Traverse Jury selection process in Putnam County.

Q In preparation for this trial, did you have occasion to go to the Putnam County Clerk's Office to investigate?

A Yes, I did on numerous occasions. I particularly spent a great deal of time in Putnam County and at the Courthouse in the Summer of 1978. As I recall, the *Bailey v. Vining* trial took place in August so during

the Summer of '78, I would have spent a great deal of time there.

Q How did you proceed with the course of your investigation when you were looking at—what were you looking for

* * * *

case is concerned with the Putnam County juries?

A The case of—the *Kirksey* case, which is one that I recall, which was an en banc opinion of the United States Court of Appeals for the Fifth Circuit was out at that time and I remember *Kirksey*, specifically noting that a history of race discrimination in the selection of jurors would be one piece of evidence that a court could take under consideration in making a finding in a vote dilution case so what I did is go—I went to the Clerk's Office and asked Mr. Dennis, who's the Clerk of Court in Putnam County, to provide me with as many jury lists as he could and when I say, "jury lists," I mean the Master List for both the Grand and the Traverse Jury. What I was interested in doing is looking historically at whether or not blacks had been underrepresented in Putnam County on the Jury List and then if I found such evidence, I would use that evidence in the *Bailey v. Vining* case as a piece of historical race discrimination evidence. And Mr. Dennis made those documents available and I perused them. My recollection is that my survey extended from sometime in the late 1940's or the 1950's up until the present, then being 1978.

Q In addition to this record search, Mr. Coates, did you make any kind of personal interview investigation, for instance, of other lawyers, who had filed challenges and so forth?

A Yes. In preparation for the case, I also perused for about a twenty-year period of the *Eatonton Messenger*, I think it is, which is the local newspaper there, and I came across an article that indicated that two

local attorneys, George Lawrence, Jr. or Chip Lawrence and Jesse Copeland had filed jury challenges in Putnam County and so I couldn't interview Jesse because he was representing the Putnam County Commissioners but I did go and interview Chip Lawrence and found out the details of the challenge that Mr. Lawrence had made to the juries in 1977.

Q Getting back to your record search, Mr. Coates, during the Summer of 1978, did you discover anything that—

THE COURT: Just a minute. In point of time, the challenge that George Lawrence, the former District Attorney, had filed in '77 actually preceded the recomposition of the Box prior prior to the *Amadeo* case, didn't it?

WITNESS COATES: Yes sir.

THE COURT: Is that right?

WITNESS COATES: Yes sir. Mr. Lawrence is—well, I do not know the answer to that question, Your Honor. Mr. Lawrence's challenge was some time prior to my study of the list which took place in the Summer of 1978.

THE COURT: But you don't know whether it preceded the *Amadeo* case?

WITNESS COATES: No sir.

THE COURT: Do either of you know?

MR. WARNER: No, I do not, Your Honor.

THE COURT: Mr. Coates, do you know whether or not this challenge was successful?

WITNESS COATES: My recollection, Your Honor, was that the Judge denied the challenge on race grounds but he ruled—but he allowed the challenge on sex grounds and he may have allowed the challenge on age grounds. That's my recollection but I have not read a transcript; it would only come from my recollection of the newspaper article.

Q MR. WARNER: Mr. Coates, I'll show you what's been marked as Petitioner's Exhibit No. 4 and ask you if you can identify that.

A Yes, I can. This is a photostatic copy of a memorandum that I found during the time that I was making my study of the Master or Grand and Traverse Jury Lists in Putnam County.

Q Where specifically, as specifically as you can recall because it's been a long time, where specifically did you find that? Was it a part of the public record?

A Well, my recollection is that there was probably a book in Putnam County that contained the Master List. There may have been lists that were in looseleaf form as opposed to a book but Mr. Dennis gave me those materials and I just don't—I don't recall whether or not it was a book or whether it was looseleaf pages but I do remember that this memorandum, I found this memorandum in those materials. It was—I do—I recall that it was not on the first page of the book and it was not on the first page of the materials that I was perusing but somewhere within the stack of materials that Mr. Dennis gave me, this document appeared.

Q Because of your broad range—well, let me rephrase that. You were not challenging a particular jury array in a criminal case in doing the case in the *Willie Bailey* case, were you?

A No sir. My purpose was not to find out whether the—my exclusive purpose or my sole purpose was not to find out whether or not the present Jury Lists in Putnam County in 1978 were unconstitutional in making my survey even though that was one of the purposes; it wasn't my exclusive purpose.

Q Would it be fair to say then that you had a broader purpose in mind?

A Right. My broader purpose was to survey all the jury materials for a twenty to thirty-year period and pick from those materials pieces of evidence that would

show as a historical matter that blacks had consistently been underrepresented in Putnam County.

Q Would it have had as much—would that memo have had as much significance for you if you had been conducting a search on a particular criminal case without the broad ranging search that you were doing?

A I think the memo would have had—from the way that I read the memo, it would have had the same impact on me whether or not I would've been doing the broad historical search or whether or not I had been doing a search for a specific jury challenge.

Q Now, after you took a look at this particular piece of documentary evidence, did you follow that up by interviewing anyone?

A Yes. Since I was in his office and since I knew that he was the Secretary to the Jury Commissioners, I went to Mr. Dennis and asked him if he was familiar with the memo and he indicated to me that he was and he indicated to me that the memo had come from the District Attorney's Office and that it was instructions to the Jury Commissioners in Putnam County about what to do concerning the Master Grand and Traverse Jury Lists. I do not remember if Mr. Dennis said at that time that the memo had been sent because of Mr. Lawrence's challenge but I inferred, knowing the circumstances, that that probably occurred.

Q Did you continue with your investigation after talking to Mr. Dennis insofar as the jury lists were concerned? In other words, did you look at the lists after this memo had been circulated?

A I looked at all the lists that he made available to me and those lists were from the one being used in 1978 until sometime back in the 1950's and I extracted from that material pieces of information that we offered at the trial.

Q Now, looking back at the people that you interviewed insofar as the jury challenges were concerned, Mr. Copeland and Mr. Lawrence, did your investigation

reveal that there was an increase in the number of blacks in juries on the panels after the challenges were made?

A Well, I think that this memorandum shows that there was an increase. I was familiar with the line of cases after *Swain vs. Alabama* that held that if the disparity between the percentage of blacks in the jurisdiction and the percentage of blacks on the lists was less than 10% that the statistical showing of old did not make out a prima facie case of discrimination. There was some cases to that effect at that time and when I saw this memorandum or the reason I went to Mr. Dennis was, what quickly came to my mind, is that this is a memo where someone has told the Jury Commissioners in Putnam County how to try to remedy the challenge to their juries, add some blacks and some women, continue to underrepresent significantly those groups while at the same time arguably coming within the *Swain v. Alabama* case; that is to say, for example, this memo shows that blacks would constitute 37% of the list on the Traverse List after the additions were made and that raised a red flag to me because I said this is still underrepresenting blacks; they're 48% of the general population according to the 1970 census. In Putnam County, they're 42% of the age eligible population and this memo is saying, add enough blacks so that you come out with 37%. Arguably, that comes with the *Swain vs. Alabama* rule but it also, to me, indicated an intent to continue to underrepresent blacks, so being somewhat familiar with the case law in the area, somewhat familiar with Mr. Lawrence's challenge and then when I saw this memorandum, it was a red flag and that's why I went to Mr. Dennis.

Q Would it be fair to say that you put it all together and made that presentation to the Court in *Willie Bailey*?

A Yes. The theories that I just articulated are the theories that I presented to Judge Owens at the time of the trial.

Q Now, after this period, after this trial was over with on August 17th, 1978, did you ever have occasion to become familiar in an indirect way with the Petitioner's case through Mr. Roy Lambert?

A I knew that—well, *Bailey v. Vining* was filed in December of 1976 and I was in and out of Putnam County in 1977. I knew that there was a bad murder case that went on over there and—but I did not know the Petitioner or I did not remember his name. After the trial in *Bailey v. Vining*, I had an occasion to have a conversation with a woman by the name of Patsy Morris. At that time I was employed by the Southern Regional Office of the ACLU and Patsy works for the Georgia ACLU but the offices are close by and I saw her on a fairly frequent occasion and I was telling her about the *Bailey v. Vining* trial and about the evidence concerning the juries and she was familiar with this case. She works as a death penalty monitor for the ACLU and so she said, 'Do you know Roy Lambert?' And I said, 'Yes, I know him. I had a case with Roy, he represented the City of Madison in a voting case I was involved with' and so she said, 'Well, be sure and let Roy know what came out in *Bailey v. Vining* because he was involved in a death penalty case that arose in that jurisdiction.' So, I cannot remember when I called but I did have occasion to call Mr. Lambert and tell him what had come out in the *Bailey v. Vining* case.

Q You did tell him? What was his—what did he say to you?

A My recollection of what Mr. Lambert said was—I told him about what we had found and what Judge Owens had done and he said, 'Well, we did not know that in the death penalty case and that we had a hard case and that I wish that we had known it because we were looking for every issue to raise because it was a serious case.'

MR. WARNER: Thank you, Mr. Coates. He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Mr. Coates, in making your investigation in the Clerk's Office at Putnam County, other than Mr. Lawrence's challenge to the Putnam County Grand Jury, did you find any other time that the jury had been challenged either successfully or unsuccessfully in Putnam County?

A Besides Mr. Copeland's challenge and Mr. Lawrence's challenge?

THE COURT: Is that one time or two?

WITNESS COATES: My best recollection about that was Jesse Copeland and Chip Lawrence were co-counsel in the case or Chip Lawrence filed his challenge and then Jesse filed his during the same term of Court.

Q MS. BOLEYN: I understood you to say, Mr. Coates, did I not, that you were trying to take an overview from somewhere around 1950's up through '78 insofar as you were in that year?

A Yes ma'am.

Q And the only ones that you're aware of is the one that Mr. Wallace and Mr. Copeland participated in, and Mr. Lawrence?

A Yet me think about that for a moment. Tom Jackson, who is an attorney here in Macon, may have filed a challenge to the juries in Putnam County prior to 1977. He had been involved in some civil rights litigation in Putnam County and it seems to me that that may have involved a jury challenge as well but I'm just not sure about that.

Q Do I understand you correctly, Mr. Coates, that what motivated you to begin your investigation for purposes of what became the *Bailey v. Vining* case was decisions coming out of the United States Supreme Court in the then Fifth Circuit?

A Yes. The vote dilution cases that said that there was an aspect of the racial history of the county that the Court could consider.

Q I guess what I'm asking, Mr. Coates, is did you go into Putnam County with the idea that you were going to find unconstitutionally selected juries or were you simply looking to see if there were any facts that would support the legal conclusions that had been made in other similar cases?

A My experience tells me that if you go back far enough in every county in Georgia, you will find the underrepresentation or exclusion of blacks from the juries, so when I started looking at the lists in Putnam County, it is correct to say that I felt that if I looked back far enough that I would find race discrimination.

Q You thought you were going to find an historical pattern of underrepresentation of blacks?

A That's correct.

Q And you weren't specifically interested—

THE COURT: Ms. Boleyn, it seems to me it would be fair to point out that in the *Bailey v. Vining* case, the focus of the case was upon the electoral process in both the City and the County and my best recollection is that the jury composition came along as an afterthought after that memo came to light. Would that be fair, Mr. Coates?

WITNESS COATES: Yes sir. At the time that the trial commenced in *Bailey v. Vining*, the Jury Commissioners were not party defendants and my recollection of what happened was that after the testimony came out concerning the memo and how the juries had been selected—how the jury was being selected, that you made the statement when Mr. Dennis was sitting where I'm sitting now, that—words to the effect that you felt that that was an entirely unconstitutional procedure and after you made that statement, then I moved that the Jury Commissioners be added as party defendants and you allowed the amendment.

THE COURT: I think the transcript so says.

Q MS. BOLEYN: So then what you really—you didn't go into attempting to attack jury selection procedures, you just happened to find that in looking for an

historical pattern of discrimination concerning voting rights, is that fair?

A That's correct, that the main thrust of the *Bailey v. Vining* litigation was an attack upon the at large voting procedures so after I found this memo and after I got, for example, how blacks were being represented in 1958 and 1964 and 1970, then I stopped because that's all that I thought that I needed to do to make that one point and then in preparation since it was a voting case rather than a jury case, I went on to the paving in the appointments and the other areas that the Court looks at in challenges to at large voting.

Q During your investigation, did you simply go to Mr. Dennis' office and ask him to look at those Master Lists and he immediately complied or did you have any difficulty in investigating the allegations that you were pursuing? Did you have to subpoena the records?

A No. My—I can't remember whether I got the lists immediately when I asked but it would've been within a reasonable period of time and it would be fair to say that Mr. Dennis was cooperative. He made the public records available to me.

Q Did Mr. Dennis in any way point you to this memo or did you just happen to find it looking through the bound and looseleaf pages in the Clerk's Office?

THE COURT: Hand me the memo, Mr. Coates. Has this been marked as an exhibit?

MR. WARNER: Yes sir, Your Honor, I believe that's No. 4.

THE COURT: Okay. Go ahead.

A WITNESS: No, Mr. Dennis did not point the memo—point me to the memo and either looking through it, whatever the Master Lists were in, whether they were loose pages or a book, within the book or the loose pages, I found the memo. It wasn't on top. I found it because I was going through all the materials.

Q MS. BOLEYN: And then you subsequently confronted Mr. Dennis and he confirmed with you that it was?

A Yes ma'am.

Q When you talked to Roy Lambert, did you give him a copy or send him a copy of the memo, if you recall?

A No, I do not recall sending Roy a copy of the memo. I think that I, at one time, gave Nelson Jernigan a copy but that would've been after I talked with Mr. Lambert.

Q Did you make available to Mr. Lambert any part of the hearing transcript or the evidence in *Bailey v. Vining* with respect to the jury?

A No, I do not remember doing that though I may have done that regarding Nelson Jernigan.

Q Did you have any reason at any time in your investigation for the broader purposes that we've discussed, did you have any reason to focus on the 1977 Jury Lists as opposed to any other lists, other than the memo?

A Well, yes in this regard. I think that I assumed in offering—I assume in offering evidence on jury discrimination in a voting case that the judges, who all Georgia lawyers know that if you go far enough back that you're going to be able to show an underrepresentation in any county that has a black—a substantial black population and so what would've been going through my mind was showing what the situation was in '77 or '78 would have had more of an impact on the Court than what took place in 1958, so to that extent, I was interested in getting the present materials and I was also interested in getting the present materials because I, in my conversations with Mr. Lawrence and my reading the local newspaper, I knew a challenge had been made.

Q What, if any, information did you receive in your investigation about dissemination of the memo that was in the pages that you found?

A That it came from someone in the District Attorney's Office and that it—the information—the memo was given to the Jury Commissioners.

Q And did you have any information that the memo was given to anyone other than the Clerk who was the Secretary to the Jury Commissioners or the Commissioners themselves?

A No.

Q I guess I want to ask you, do you know whether any lawyers in the county were familiar with that memo at that time?

A Well, someone in the District Attorney's Office was familiar.

Q Correct; other than that? I was just—my question goes to whether you have any information about it had been disseminated to the public at large as opposed to the Jury Commissioners?

A No, and the information that I got would indicate just the contrary. In talking with Mr. Lawrence, I told him about the memo and because I thought the memo was in response to his challenge and he seemed surprised. It did not appear to me that Lawrence, the one lawyer in the County, knew that the District Attorney had actually gotten involved in telling the Jury Commissioners how many blacks to put on the lists.

Q In your conversation with Mr. Lambert, did he indicate that he knew of the existence of the memo prior to your conversation with him?

A No. My recollection on that is absolutely clear and that is that Mr. Lambert indicated that he did not know of the memo and he did not know of any actions involving the District Attorney telling the Jury Commissioners how many blacks to put on the lists.

Q Did you ever talk with William A. Prior about the *Amadeo* case or the jury selection issue?

A No, I did not. I know Judge Prior because he represented the Morgan County Board of Commissioners and I was involved in a voting case with them and we were talking during this period of time because of the voting case; it was *Butler v. Underwood* was still going

on but I do not ever remember talking with Billy Prior about this case.

Q About *Amadeo* or about the memo in connection with anything else?

A Yes.

MS. BOLEYN: No further questions, Your Honor.

THE COURT: Anything else?

MR. WARNER: I don't have any further.

TESTIMONY OF C. NELSON JERNIGAN

[Transcript of November 15, 1985 Hearing at 54-62]

BY MR. WARNER:

Q Would you state your name and address for the record, please sir?

A Nelson Jernigan.

Q Mr. Jernigan, where do you reside?

A 535 Pinetree Drive, Atlanta.

Q What occupation are you engaged in?

A Lawyer.

Q And do you practice in the City of Atlanta?

A Yes. I have an office in Peachtree Center, South Tower.

Q How long have you been licensed to practice law in the State of Georgia?

A It'll be nine years this year, this month.

Q Now, in regard to Mr. Tony B. Amadeo's Appellate Court action, were you ever contacted by Mr. Roy Lambert about this?

A Yes.

Q Can you tell the Court how that occurred, please?

A It was in January or February, I believe in 1979, I was in the Legislature for five years so I think it was '79 or maybe it was '78, and I spent a lot of time with Roy Lambert and other people in the Legislature in promoting the, what we were trying to put together, the Georgia Indigent Defense Counsel or the Georgia Indigent Defense Bill, so I was pretty regularly around Mr. Lambert. And I was up at, I believe, at the Mariott on many occasions at meetings at nights with various administration leader people for Governor Busbee talking about this bill and that's where he—we started talking about these kind of cases and he said, 'Will you help me on this case?'

Q Did he ask you to make any kind of investigation with regard to the jury issue?

A I believe—my best recollection is he didn't specifically say that; he just gave me the file or a portion of the file and said, you know, 'Go to work on this and see what you can find.'

Q And what did you do?

A Well, of course, I read what I had of the record and I called people that had tried cases in that area and called, I don't remember exactly who, but various people that had tried cases down there against Joe Briley because I knew who the prosecutor was and knew of him. And I wound up finding Chris Coates and talking to him, who at that time was working on a case, I don't remember the name of it, but it was a civil rights voter kind of case, and I talked to Chris about this and I said, 'I understand you've been working in Putnam County' and I said, 'I'm researching, you know, various issues that may be used in the appeal of this case to the Court of Appeals.' And he said, 'Well, I think I have something you'd be interested in.' We met in person; we went over either a copy of or the, what was called the note that later I think was found to be handwritten by the District Attorney out there, Joe Briley. And I thought about that for a few days and so in answer to your question, I'm trying to elucidate it slightly but I don't think he specifically directed me to that, but I found it pretty soon after he put me on the job.

Q And you say, Mr. Jernigan, that this probably in January of '79, is that correct?

A Yes, be January or February because the Legislature was in session then. Roy, of course, was busy with the Legislature. He was House Administration Leader and had been at that point like twenty-six years so, you know, he was pretty covered up which I think is probably one of the reasons he asked me to help.

Q Did you make any findings and draw any conclusions and make any findings that you reported to Mr. Lambert?

A Well, yes. When I found this jury issue, you know, I can remember where I was and it was like "Eureka," you know, because I thought this was a good issue in the case; I mean, good for Mr. Amadeo because I had worked for Superior Court judges and I had specifically researched that issue of the relationship of court officials to Jury Commissioners because at one time, a Superior Court judge wanted to delegate that process to me back when I was a court administrator and I had researched it and I said, 'I don't think you can do that. I think it's the Code and the historical development of the law requires that only the Superior Court judge be instructing and answering questions from the Jury Commissioners.' And so when I saw that a person who was a lawyer who had an interest in cases that would be tried by the jurors had directly communicated to the Grand Jury—to the Jury Commissioners, I thought that that was an impropriety of some significance. But setting that aside, what was in the note was, you know, clear to me that it was a scheme to intentionally discriminate in the selection process of the jury but still try to get the figures to come up to meet the standards which I think back in those days, was the case of *Whitus* and *Swain* come back to me; I haven't read any of the file or anything so I'm a little fuzzy on that. That's what I remember about the cases and I said, 'This is a great issue because there's intentional discrimination by instructing the Jury Commissioners from someone who has an interest, an advocate, who's going to appear before these jurors; in other words, he's stacking the jury.' And also the intentional discrimination was evident by him pulling the numbers down to the minimum. In other words, he was trying to hit, as I recall and I have not read any of the case since 1979, that the numbers were pretty close to the standards to make out a prima facie case of discrimination. So, I went back and talked to Roy about this issue and he said, 'Yeah, we didn't think there was anything wrong with the Box. That issue had occurred to us but

we didn't think there was anything wrong with the Box.' And it looked like what the information we got, and I do not remember how they went about it, but they said the information, that it appeared to us it was okay. I said, 'Well, there was no way by looking at the numbers that it would alert, you know, a lawyer to look further into it.' They looked okay. I said, 'All of this was secret and hidden.' So, without a, you know, fairly massive, and at that point, unjustified, evidentiary hearing and being able to divine that this process had gone on or something like that, it could've, you know, wouldn't have been reasonable to expect anybody to do it.

Q Did he indicate to you a willingness to assert that issue?

A Oh, he thought it was great, yeah. He was writing the Brief.

Q What did he say about his prior knowledge of it and what he would've done?

A Well, I can't say specifically—I don't think he told me what he would have done; I think he just said that it was a great issue, I wish I'd known it.

Q Did he say anything to you in regard to—well, he did say something to you in regard to not knowing this issue prior to trial, is that correct?

A If I understand what you're trying to ask me, did he say that he didn't know about the issue?

Q Prior to trial, prior to the trial of the case?

A No, he didn't know about this issue prior to trial.

Q And he expressed a willingness to urge this issue. Did he tell you anything about the fact that he was raising this at the earliest possible time that he knew about it?

A Well, the earliest possible time was then and he said, 'Yeah, it's a, you know, he—' I wrote the Brief and I don't know, I haven't seen the finished copy, I don't know what was taken out or put in, I didn't—I was just functioning as a law clerk, I guess, or as a favor to Roy, Mr. Lambert. And I took the Brief back to him and we

sat in the hotel room up in the Mariott in Atlanta and he read it aloud, read the whole Brief aloud cause that's a habit of his to do that, and, you know, he said, 'This is a great issue. I want you to help me prepare for the oral argument because I've got to do all this by myself.' So, apparently, I didn't know who else was involved in the case. I saw Judge Prior this morning so obviously he was the other lawyer, but I didn't—all my contacts were with Roy and he had the responsibility for doing it all, from my—as far as I knew.

MR. WARNER: He's with you, Ms. Boleyn.

CROSS EXAMINATION

BY MS. BOLEYN:

Q Did you know, Mr. Jernigan, at the time that Mr. Lambert approached you about helping him, at what stage the proceedings against Mr. Amadeo were at that time?

A I understood it to be the direct appeal from a trial court to the Georgia Supreme Court from trial.

Q Do you know whether or not the Motion for New Trial had already been conducted or not, do you recall?

A I do not recall; I'm sure—if it was in the file, I read it; if it wasn't in the file, I, you know—it's been seven years so.

Q Did you do any investigation after you talked with Mr. Coates about whether there had been any other successful or unsuccessful jury challenges in Putnam County?

A No.

Q Did you know—the first you knew about this memo was your discussion with Mr. Coates that you've already described?

A I had heard about that. I'd heard about it, and I tracked down to—I didn't know Chris Coates before this jury, no; I heard—I don't know, heard it on the grapevine, I guess, legally from other lawyers that there's

something going on in Putnam County, and then I found Chris Coates in a day or two and it was the first time I met him and we went over the case.

Q Was what you heard that it had been established in a proceeding or was it the rumor was that the memo had been implemented? I mean, it had to have been—

A All I remember was the note and I don't remember anything about where any court proceeding might have been at that time. All I knew was about the note and I knew that it was, you know, indicated a real problem with the Grand Jury, selection of the Grand Jury, and that's what I acted on.

Q And you said that you'd never spoke with Judge Prior about Mr. Amadeo's appeal?

A I may have; I cannot, you know, on my oath, say that I did not but I do not recall any specific instruction. There were other people in the room but it was Roy who seemed to have the primary responsibility and the decision-making.

Q Did you ever get a copy of the note?

A Of the what?

Q Did you ever get a copy of the note or the memo?

A I don't remember.

Q Do you remember giving a copy of it to Mr. Lambert? Did he have a copy?

A I don't know; I don't recall whether he had one in his possession or not.

MS. BOLEYN: No further questions, Your Honor.

THE COURT: Anything else, Mr. Warner?

MR. WARNER: Just one further question.

REDIRECT EXAMINATION

BY MR. WARNER:

Q Mr. Jernigan, do you recall Mr. Lambert ever saying to you, 'If I'd known about this jury issue prior to trial, I would've raised it.'

A Yeah, I recall that. He said, 'It'd been a great issue if I'd known about it.'

MS. BOLEYN: He may be excused.

MR. WARNER: You may be excused. Thank you for coming.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(Title Omitted in Printing)

PETITIONER'S MOTION FOR A CHANGE OF VENUE

Introduced into Evidence, *Amadeo* v. *Kemp*,
Civ. A. No. 84-76-1-MAC (M.D.Ga.)

[Transcript of November 15, 1985 Hearing at 63]

The motion of TONY S. AMADEO, WILLIAM S. CONLOGUE and DAVID L. COULTER, show the following facts:

1.

That they have been indicted in the Superior Court of said County for murder, in that it is alleged that they did on the 29th day of September, 1977, kill James D. Turk, Sr.

2.

Movants are now detained in the common jail of Putnam County, Georgia.

3.

Movants show that on account of the excitement and common and inflammed state of public opinion that has existed since the homicide, which was calculated to poison the minds of the jurors of said County, and further, a large portion of the jurors have formed an opinion as to the Movants' guilt or have become prejudiced or biased against them, either from having heard the testimony at the committal hearing or from having heard statements of others and from certain evil disposed persons, relatives and friends of the deceased, who circulated rumors ex-

ceedingly damaging to the Movants and prejudicial to a correct determination of the issues involved in this case, and that the public mind has been so poisoned and prejudiced by exaggerated rumors in the newspapers and local press that Movants will be unable to get a fair trial by an impartial jury in said County, this sort of trial that they are entitled to under the laws of the land, the State of Georgia, and the United States. There is also danger of violence being attempted to be committed on the accused.

WHEREFORE, Movants, insisting upon their innocence, move this Court to change the venue in said case, and that they be ordered tried under said indictments in some other County in the Circuit and in the State of Georgia other than the County aforesaid.

/s/ E.R. Lambert

/s/ William A. Prior, Jr.
Movants' Attorneys

PETITIONER'S MOTION FOR A CONTINUANCE

Amadeo v. *State*, 243 Ga. 627, 255 S.E.2d 718 (1979),
Introduced into Evidence, *Amadeo* v. *Kemp*,
Civ. A. No. 84-76-1-MAC (M.D. Ga.)

[Transcript of November 15, 1985 Hearing at 63]

[Style and Certification Omitted]

Now comes the hereinabove named Defendants and move the Court for a continuance of the trial of the above shown cases based on the affidavits of counsel for said Defendants attached hereto and made a part of this Motion.

/s/ E.R. Lambert

/s/ William A. Prior, Jr.
Attorneys for Movants

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

GEORGIA, PUTNAM COUNTY:

We, William A. Prior, Jr., and E. R. Lambert, both being duly sworn, depose and state on oath the following:

1. We are appointed attorneys for the accused in the above entitled case.

2. This Affidavit is in support of accused' motion for an order to continue the trial of the case until the third week in March, 1978.

3. Appointed counsel have used all due diligent in preparing the case for trial, but because of certain circumstances, that is, Defendants have been lodged in the

Putnam County jail and counsel for Defendants reside and practice law in Madison, Morgan County, Georgia, and because of the inconvenience of travel and time limitations, appointed counsel have been unable to confer with Defendants and because of inconvenience and of a place to interview Defendants, because one Defendant is a resident of the State of Maine, one Defendant is a resident of the State of Minnesota and one Defendant is a resident of the State of Texas, counsel for Defendants have been unable to contact and interview the families of said Defendants, said Defendants are presently members of the United States Marine Corps stationed in Jacksonville, North Carolina, and because of the distance to Jacksonville, North Carolina, counsel for Defendants have been unable to confer with the military superior officers of said Defendants, counsel for Defendants have requested that the Defendants be examined by a qualified psychiatrist at Central State Hospital and although the examination has been conducted, the counsel for Defendants have not received the report from this examination and do not know the results thereof and are therefore unable to form an opinion as to the sanity of said Defendants prior to arraignment, counsel of Defendants have not been furnished with a list of witnesses including the arresting officer of Defendant Coulter and Defendant Conlogue in McDuffie County, Georgia, arresting officer of Defendant Amadeo nor military personnel in Ft. Gordon, Georgia, where Defendant Amadeo was incarcerated for a short period of time, as well as other witnesses whose testimony may be material to the outcome of this case and counsel, through no fault of their own or that of Defendants, do not have reasonable time to try the case for trial, and unless a continuance is granted, the accused will be deprived of a fair trial.

4. The case should not be allowed to proceed to trial before the third week in March, 1978, on account of the

passions and prejudice engendered against the Defendants by the public communications media.

5. Newspapers and radio have since September 29, 1977, reported prominently the stories. These stories and radio accounts have engendered popular excitement and prejudice against Defendants in such a manner that it is impossible for them to obtain a fair trial at this time.

6. Affiants believe that the passage of time will allow passions, excitement and prejudice to subside and that the Defendants will have a better chance for a fair trial if the trial is continued until the third week in March, 1978.

7. We swear that the contents of the above and foregoing to be true and correct to the best of our knowledge. So help me God.

/s/ William A. Prior, Jr.
WILLIAM A. PRIOR, JR.

/s/ E.R. Lambert
E.R. LAMBERT

SUPREME COURT OF GEORGIA

TONY B. AMADEO

v.

GEORGIA

May 2, 1979

NICHOLS, Chief Justice.

Tony B. Amadeo appeals his conviction for the murder of James D. Turk, Sr., and the sentence of death imposed upon him for this offense. He also appeals his conviction for the offense of criminal attempt to commit theft. This court affirms.

This is a companion case to *Conlogue v. State*, 243 Ga. 141 (253 SE2d 168) (1979).

1. The admission in evidence of his statement is enumerated by Amadeo as error, based upon a contention that the statement was not made voluntarily in that it was induced by hope of benefit. Code Ann. § 38-411. This court must accept the factual and credibility determinations of the trial court made after the Jackson-Denno hearing unless those determinations are clearly erroneous. *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974); *Pierce v. State*, 235 Ga. 237, 239 (219 SE2d 158) (1975).

During the Jackson-Denno hearing, Amadeo testified that one or perhaps both of the GBI agents who questioned him told him if he would give a statement, he or she would talk with the district attorney and Amadeo probably would get a lighter sentence. Amadeo was not positive in his testimony as to whether it was the male

agent, or the female agent, or perhaps both, who made this offer, but he believed it was the female agent. The female agent testified with some equivocation both that she did not make any such statement and that she could not recall having made any such statement; and that she thought she had not done so. Each of the agents was out of the room during parts of the questioning. The issue made in this court by the parties relates alone to what the female agent either did or did not say. This court agrees with the trial court that these circumstances presented to the trial court a close question of whether or not Amadeo's statement was induced by hope of benefit. However, after careful consideration of the total circumstances, including Amadeo's own inconclusive testimony as to who made the alleged offer of benefit, this court concludes that the decision of the trial court to admit the statement was not clearly erroneous. The first enumeration of error is without merit.

2. Amadeo next complains of the admission of evidence of his participation with David L. Coulter and William S. Conlogue in a robbery-murder in Alabama. The three were absent without leave from the United States Marine Corps Base at Camp LeJeune, North Carolina. They had been traveling together in Amadeo's automobile through Tennessee, Alabama and Georgia. The Alabama offenses were committed on September 28, 1977, and the Georgia offenses occurred at approximately 8:30 a.m. on September 29, 1977.

There was evidence from which the jury could have determined that the same three persons, using the same firearm and escaping in the same motor vehicle, had perpetrated the offenses in Alabama and in Georgia for the same reason—that is, to obtain money with which to continue their travels. The conditions of admissibility as set forth in *French v. State*, 237 Ga. 620 (229 SE2d 410) (1976), are satisfied. The trial court charged the jury as to the limited purpose for which these similar crimes

were being admitted—that is, to illustrate Amadeo's intent or state of mind—a purpose for which our decisions recognize an exception to the general rule against admissibility of evidence of other criminal activity. Code Ann. § 38-202. *Clemson v. State*, 239 Ga. 357, 360-361 (236 SE2d 663) (1977); *Thomas v. State*, 239 Ga. 734, 736 (238 SE2d 888) (1977); *Booker v. State*, 242 Ga. 773 (251 SE2d 518) (1979); *Burgess v. State*, 242 Ga. 889 (252 SE2d 391) (1979). The second enumeration of error is without merit.

3. Amadeo next urges that it was error for the trial court to charge Code Ann. § 26-1902, pertaining to armed robbery, because the indictment only charged criminal attempt under Code Ann. § 26-1001. The charge taken as a whole could not have harmed Amadeo. *Hilton v. State*, 233 Ga. 11 (2) (209 SE2d 606) (1974). The trial court explained this portion of the charge to the jury as follows: "Now let me say that he is not charged with the offense of armed robbery. He is only charged with the offense of criminal attempt and I only give you this pertinent portion of the code section which I have just cited in order to clarify to you the wording of count two in the indictment." The third enumeration of error is without merit.

4. Amadeo's fourth enumeration of error relating to jury composition is without merit as his challenge comes too late. *Goodwin v. Hopper*, 243 Ga. 193 (253 SE2d 156) (1979); *Harris v. Hopper*, 243 Ga. 244 (1979; *Holton v. State*, 243 Ga. 312 (1979). The case of *Barrow v. State*, 239 Ga. 162 (1) (236 SE2d 257) (1977), is to be distinguished from the present case in that Barrow's conviction and sentence had been set aside on appeal, after which he filed and pursued timely challenges to the arrays then brought his case back to this court by interlocutory appeal after denial of his challenges but *prior to trial and conviction*. Barrow did not take his chances with unchallenged grand and traverse juries then attempt

to challenge the arrays after conviction, this being the trial tactic that is precluded by such decisions as Francis v. Henderson, 425 U.S. 536 (96 SC 1708, 48 LE2d 149) (1976) and *Goodwin v. Hopper*, supra. The fourth enumeration of error is without merit.

5. Amadeo's fifth enumeration of error contends that the trial court erred in overruling his motion for new trial for the reasons stated in his previous enumerations of error. This enumeration of error is without merit for the reasons previously stated in this opinion.

Sentence Review

To authorize affirmance, the death sentence imposed in this case must conform to the standards set forth in Code Ann. § 27-2534.1. Those standards require this court to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's findings of statutory aggravating circumstances; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, as required by Code Ann. § 27-2537(c) (1-3).

We have reviewed the trial transcript and record and have made a comparison of the evidence and sentence in similar cases pursuant to the mandate of the statute.

We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor.

In recommending the death penalty, the jury found the following statutory aggravating circumstance: "That the offense of murder was committed while the offender was engaged in the commission of another capital offense, to wit: Armed Robbery." Code Ann. § 27-2534.1(b) (2).

The "while . . . engaged in the commission of" requirement of that subsection does not require that the subject

felony shall have been completed or that the offender shall have been charged with or convicted of the felony. In a pre-trial statement that was admitted into evidence, the appellant admitted that he and his two companions had been driving around, when they spotted a man in a brown pickup truck dumping trash into a dumpster. They turned around and came back, at which time the appellant got out of the back seat with his .22 automatic, walked up to the truck, and demanded money from the man. Appellant then shot the man. The man grabbed his chest, slid off the right side of the truck to the ground, and yelled for help. Appellant ran for the car and they departed. Amadeo was "engaged in the commission of another capital offense, to wit: Armed robbery" when he shot the victim. *Moore v. State*, 233 Ga. 864 (213 SE2d 829) (1975).

The evidence supports the jury's finding of a statutory aggravating circumstance, and the verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed. We find that the similar cases listed in the Appendix support the affirmance of the death penalty in this case. Tony B. Amadeo's sentence to death is not excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP, Warden

May 17, 1984

OWENS, District Judge:

Congress, by law, has given every person imprisoned as a result of a state court conviction the right to file a petition in a United States district court alleging that his conviction was "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2554. Congress has imposed a duty upon United States district judges to determine in each such case whether or not the Constitution or laws of the United States were violated. If so, such convictions must be overturned; if not, such convictions must remain undisturbed.

Petitioner Tony B. Amadeo, having been convicted in Putnam Superior Court of murder and attempted theft and sentenced to die, and having exhausted all state court remedies for attacking his conviction, *Amadeo* v. *State*, 243 Ga. 627, 255 S.E.2d 713, *cert. denied* 444 U.S. 974 (1979), petitioned this court alleging that his conviction resulted from eight constitutional errors and requests that his conviction and sentence be set aside. Respondent denied each and every allegation of error. The petitioner and respondent agreed that no evidentiary hearing is required and asked for this court's decision on each issue. Since two of said issues each require that petitioner's

conviction and sentence be set aside, the remainder of said issues will not be considered.

I. *Admission of "Other Crimes" Evidence*

Petitioner was indicted for the murder of James D. Turk, Sr. The state alleged that petitioner killed Mr. Turk at approximately 8:30 a.m. on September 29, 1977, near Eatonton in Putnam County, Georgia. At trial, the prosecutor was prepared to present extensive evidence of petitioner's involvement in a robbery and murder committed in Colbert County, Alabama during the night preceding the murder of James Turk; petitioner had not been tried for either Alabama crime. The petitioner moved in limine to exclude the Alabama "other crimes" evidence, arguing that it was irrelevant, not probative of the offense for which he was being tried or any disputed issue, and that its prejudicial effect would deprive him of a constitutionally fair trial. *See* Ga. Code Ann. § 38-202; 38-415 (now codified at O.C.G.A. §§ 24-2-2; 24-9-20(b)); *cf.* Fed.R.Evid. 404. The trial court overruled petitioner's motion to exclude, finding the evidence to be probative of petitioner's identity as the perpetrator and of his motive. Tr. at 79-80. The Georgia Supreme Court affirmed on the theory that the evidence was probative of motive, *i.e.*, that the Alabama and Georgia homicides were committed for the same reason—to obtain money while petitioner was AWOL from the United States Marine Corps. *Amadeo*, 243 Ga. at 629, 255 S.E.2d at 720. In his brief before this court, respondent asserts yet another basis for admission: to rebut petitioner's "defense" of an accidental shooting.

In order to access petitioner's constitutional claim, it is necessary for this court to consider the nature and strength of the prosecution's evidence separate and apart from the evidence of the preceding Alabama incidents.

First, before the trial judge considered petitioner's motion to exclude evidence of the Alabama crimes, the

following written confession signed by petitioner was found to have been voluntarily given and to be admissible in evidence:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old white man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. *Then I shot him. I shot one time.* The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.

Tr. at 255 (emphasis added).

Second, an eyewitness, Talmadge Holder, testified that as he pulled into the dumpster area, only two vehicles were present—the victim's pick-up truck and a white Monte Carlo, later identified as petitioner's automobile. Mr. Holder testified that he observed a short, white male standing along side the victim's truck. Mr. Holder waved at the victim (the two were prior acquaintances), and he then proceeded to leave the area by pulling onto the highway. Mr. Holder heard the victim screaming for help, yelling that he had been shot; he then observed the Monte Carlo leave the area. Mr. Holder positively identified petitioner as the man he had seen facing the victim and

the man who subsequently exited in the Monte Carlo. Tr. at 100.

Finally, the prosecution offered testimony from a state crime lab expert. The victim had been shot with a .22 caliber weapon. A spent .22 caliber shell casing was found in the bed of the victim's truck. The crime lab testified that if a semi-automatic firearm was used to kill Mr. Turk, this shell casing could have been ejected into the truck bed had the fatal shot been fired by one pointing the gun roughly parallel to the truck—a configuration consistent with Holder's description of the position of petitioner, Mr. Turk, and the pick-up truck. On the same day as the homicide the police seized a white Monte Carlo registered to petitioner and identified by Holder as the car he observed at the homicide scene. The police seized a .22 caliber semi-automatic handgun from this vehicle. The crime lab expert testified that firing pin and ejector markings on the spent casing found in the victim's truck positively matched the markings on a test round fired from this weapon. The identical nature of these markings led the expert to the opinion that the victim was killed by this gun. Tr. at 147-148.[1]

The petitioner presented no evidence in defense, Tr. at 240; instead he put the state to its customary burden of proving the charges beyond a reasonable doubt.

The prosecutor, stating that the Alabama evidence demonstrated that petitioner was on a "murderous rampage" (Tr. at A-264) and that he "enjoys killing" (Tr. at A-265), argued that the evidence was necessary for several purposes. An analysis of these reasons reveals that none justified admission of evidence of the preceding Alabama crimes.

First, the prosecutor argued that the Alabama evidence was necesasry to show the identity of petitioner

[1] The projectile recovered from the victim's body was too mutilated for comparison. The expert was able, however, to identify it as being of a .22 caliber.

as the perpetrator. The confession, eyewitness testimony, and ballistics evidence removed any doubt as to the identity of petitioner as the perpetrator. Petitioner's identity was never disputed by evidence upon his trial.

Second, the state argued that the Alabama evidence was necessary to prove motive or an intent to rob. Petitioner's own confession conceded that robbery was his motive and defense counsel in closing argument admitted petitioner intended to rob the victim. Tr. at A-262. Petitioner's motive was thus not a disputed issue.

Finally, the state argues that the Alabama evidence was necessary to refute petitioner's "defense." The state points out that petitioner's counsel in both opening and closing argument urged that the confession was involuntary and that the shooting was accidental. Therefore, the state argues, the Alabama evidence was necessary to corroborate the confession and to disprove an accidental shooting. The state overlooks the fact that defendant put up no evidence whatsoever in support of these claims. There was no evidence offered in support of the claim of accident, nor did the petitioner testify at trial as to the voluntariness of his confession. The arguments of counsel *were not evidence.* Petitioner's arguments had the legal effect of simply urging the jury to consider whether the state met its burden of proving its case beyond a reasonable doubt. The issue before the trial court was not whether the Alabama evidence was necessary to refute counsel's unfounded arguments. Instead, the trial court's sole inquiry should have been whether the state's case, apart from the Alabama crimes evidence, was sufficient to go to the jury on the elements of identity, motive, and intent. The admittedly prejudicial Alabama crimes evidence should have been admitted only if the state's case was absolutely void as to one of these necessary elements. The state possessed ample independent evidence as to each of these

elements. Therefore, the evidence of the Alabama crimes was clearly inadmissible.

Title 28 U.S.C. § 2254 is a statutory remedy for the correction of constitutional errors. Not all trial court errors are of constitutional dimension. Was this error in the admission of evidence of preceding Alabama crimes an error of constitutional dimension?

In order for an error on evidentiary matter such as this to warrant relief in this court on constitutional grounds, the error must have deprived the accused of the fundamental fairness that the Constitution assures all defendants. *Jameson* v. *Wainwright*, 719 F.2d 1125, 1126 (11th Cir. 1983). When fundamental fairness is lacking because of the improper receipt of "other crimes" evidence a showing of "gross or conspicuous" prejudice is satisfied. *Britton* v. *Rogers*, 631 F.2d 572, 575 (8th Cir. 1980).

This court concludes that the introduction of the Alabama evidence denied petitioner a fundamentally fair trial. This conclusion is based on two factors. First, the introduction of this evidence was totally unnecessary for the purposes advanced in support of admission. Given the strength of the state's evidence, this court is compelled to conclude that this case is evidence of sheer prosecutorial overkill. Second, regardless of whether this error could be found harmless as to the guilt-innocence phase, its potential for infecting the jury with unfair prejudice at the sentencing phase demands a re-trial of petitioner's case.[2]

[2] The court has not been advised as to whether there has been a final disposition of any criminal charges filed by Alabama authorities against this petitioner relative to the Alabama robbery and homicide. While evidence of such a conviction, if any, shall be inadmissible at the guilt-innocence phase of petitioner's retrial, the court expresses no opinion as to the admissibility of such evidence, if any, at a subsequent sentencing proceeding pursuant to O.C.G.A. § 17-10-30(b)(1).

II. *Jury Composition*

Petitioner was indicted by a Putnam County grand jury and convicted and sentenced to death by a Putnam County petit jury in 1977. In an unrelated civil action decided in 1978, this United States district court found that the jury selection procedures theretofore employed in Putnam County were intentionally designed to underrepresent black citizens in an unconstitutional manner. *Bailey* v. *Vining*, Civil Action No. 76-199-MAC (M.D. Ga. Aug. 16-17, 1978) (Evidentiary Hearing at 118-19).[3] Under prevailing law at the time of petitioner's

[3] [By Plaintiffs' Counsel] Q In 1977, after Judge Jackson ruled that the jury list needed to be reconstituted, did you receive a memorandum from the office of the solicitor?

A Yes.

Q I will show you what's been marked as Plaintiff's Exhibit A and ask if you could identify it?

A Yes Sir. . . .

* * * *

Q In reconstituting the jury list, Mr. Dennis; did the jury commissioners aim at the figures suggested there by the writer of this memorandum?

A Yes, they did. I turned that list over to the chairman of the jury commission.

Q With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on the grand jury list?

A Yes.

Q And that was supposed to bring the percentage up to 31.4 percent?

A Correct.

Q With regards to—

THE COURT: Is this the way the present jury box is made up in your county?

THE WITNESS: Yes sir.

MR. COATES: Your Honor—

THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.

MR. COATES: Your Honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury com-

trial, a 10% underrepresentation of minorities would not create a prima facie case of discrimination. *Swain* v. *Alabama*, 380 U.S. 202, 208-09, 85 S.Ct. 824, ——, 13 L.Ed.2d 759, 766 (1964). An underrepresentation of 15% or more could constitute a prima facie case. *Preston* v. *Mandeville*, 428 F.2d 1392, 1393-94 (5th Cir. 1970). In *Bailey*, this court found that the Putnam County Jury Commissioners intentionally selected a specific number of individually designated blacks so as to achieve an underrepresentation of approximately 11%—not enough to make out a prima facie case but underrepresentation nonetheless. Of course, such individual, subjective selections are also unconstitutional. *Cassell* v. *Texas*, 339 U.S. 282, 290 70 S.Ct. 629, ——, 94 L.Ed. 839, 849 (1950). Clearly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries.

Petitioner's trial counsel did not raise a jury composition challenge at trial. After petitioner's conviction, but before his appeal became final, this court's decision in *Bailey* was released. Petitioner's counsel asserted a jury composition challenge for the first time on appeal, but the Georgia Supreme Court held this claim had been waived, pursuant to Ga. Code Ann. § 59-803 (now codified as O.C.G.A. § 15-12-162), as such claim must be asserted at trial. *Amadeo*, 243 Ga. at 629, 255 S.E.2d at 720.

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missioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

* * * *

THE COURT: Well, there's no question in the Court's best judgment that the jury box as it now exists is unconstitutionally composed and cannot be further utilized for any purpose until it is completely reconstituted, both in accordance with the statutes of the State of Georgia and the decisions of the Supreme Court of the United States and of the other courts to the extent they may supplement and add to the decisions of the Supreme Court.

Bailey v. *Vining*, Civil Action No. 76-199 MAC (M.D. Ga. Aug. 15-17, 1978) (Evidentiary Hearing at 118-119; Order of August 17, 1978, at 7).

Petitioner seeks to assert the jury composition claim in this habeas corpus action. The respondent urges that this claim has been waived under a valid state procedural rule and cannot be asserted here absent a showing of "cause and prejudice" for the failure to assert this issue at trial. *Francis* v. *Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, ——, 48 L.Ed.2d 149, 154 (1976).

As the Eleventh Circuit Court of Appeals has noted, "cause" under *Francis* v. *Henderson* has never been explicitly defined. *Smith* v. *Kemp*, 715 F.2d 1459, 1470 (11th Cir. 1983). The Supreme Court has indicated that the cause and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as "sandbagging." *Wainwright* v. *Sykes*, 433 U.S. 72, 89-90, 97 S.Ct. 2497, 2507-08, 53 L.Ed.2d 594, 609 (1977). Where there has been no deliberate bypass, the state courts have been provided an opportunity to rule on the question prior to the filing of a federal action, and correction of the error is necessary to avoid a miscarriage of justice the cause and prejudice test is designed to preclude ar- F.2d at 1470.

Petitioner's failure to assert this issue at trial was not deliberate. Petitioner's counsel, looking at the statistics at the time of trial, was justified in assuming that an attack upon the jury would be futile. It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted this claim on direct appeal to the Georgia Supreme Court, years before a federal action was first filed. That Court in its discretion declined to find sufficient cause under analogous state law to excuse the waiver. As a matter of constitutional law, this court is not bound by

that decision. This court continues to be appalled by the manner in which the Putnam County jury commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation—and hand selection of those blacks who did serve—on the basis of a rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court also to grant the writ on the basis of an unconstitutionally composed grand and petit jury.

CONCLUSION

Either of these constitutional errors—admission of other crimes evidence or indictment and trial by grand and petit jurors selected from an unconstitutionally composed jury list—require that petitioner's conviction and sentence be vacated and that petitioner be reindicted and tried again for the murder of James D. Turk, Sr. It is therefore unnecessary to consider the remainder of petitioner's claims.[4] Accordingly, within 180 days from this decision becoming final because of expiration of time to appeal or the issuance of a mandate affirming this order, whichever is later, respondent shall cause petitioner to be reindicted and retried. The respondent shall keep the clerk of this court apprised of the manner in which this order is being complied with. If respondent fails to comply, petitioner may make a written motion for the issu-

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[4] Although this court does not address the admissibility of petitioner's confession, the court notes that the conclusory findings of fact contained in the record are possibly inadequate. On retrial the parties and the trial court are urged to consider that possibility.

Finally, at the risk of making an advisory opinion, the court is concerned by the repeated instances in which the trial court advised the jury that petitioner's trial counsel were appointed to represent him. Tr. at 4, 85. Such comments are unnecessary and potentially prejudicial to petitioner's Sixth Amendment right to effective assistance of counsel.

ance of a writ of habeas corpus discharging him from custody and, absent good cause shown, it shall issue.

SO ORDERED, this 17th day of May, 1984.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY B. AMADEO

v.

RALPH KEMP

September 30, 1983

Before VANCE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

FACTS

Appellee, Tony B. Amadeo, is currently an inmate under sentence of death at the Georgia Diagnostic and Classification Center. Adameo was indicted for the murder and armed robbery of James D. Turk. At trial, the prosecutor was prepared to present evidence of petitioner's involvement in a robbery and murder committed in Colbert County, Alabama during the night preceding the murder of James Turk. Amadeo had not been tried for either Alabama crime. Counsel for Amadeo moved in limine to exclude the "other crimes" evidence. The trial court overruled the motion, finding that the evidence was probative both as to Amadeo's identity as the perpetrator as well as motive. He was convicted in the Superior Court of Putnam County, Georgia for the offense of murder and for criminal attempt to commit theft. Amadeo received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. The Supreme Court of Georgia affirmed

appellee's convictions and sentences. *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979). The United States Supreme Court denied certiorari. Appellee then filed a petition for writ of habeas corpus in the Superior Court of Putnam County, Georgia. After relief was denied, Amadeo filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia. This application was also denied. The Supreme Court again denied certiorari.

Amadeo then filed an application for federal habeas corpus in the District Court for the Middle District of Georgia raising all the grounds contained in his application for state habeas corpus relief, except for the claim that he received ineffective assistance of counsel because of the failure of his trial attorney to raise a challenge to the composition of the grand and traverse juries prior to appellee's trial. The district court dismissed the petition for the writ of habeas corpus without prejudice due to appellee's failure to exhaust his contentions concerning ineffective assistance of counsel.

Appellee then filed another state habeas corpus petition raising the contention of ineffective assistance of counsel due to the failure to challenge the jury composition. The superior court dismissed the petition as successive. Appellee then filed an application for a certificate of probable cause to appeal which was denied by the Georgia Supreme Court. Certiorari was again denied by the United States Supreme Court a third time.

Appellee then filed the second petition for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. On May 17, 1984, after both petitioner Amadeo and the State of Georgia had briefed the contested issues, the district court entered an order granting federal habeas corpus relief, vacating appellee's conviction and sentence and directing that appel-

lee be reindicted and retried.[1] The state filed a timely notice of appeal.

There are two issues on appeal in this case:

1. Whether the district court erred in concluding that the appellee had satisfied the "cause and prejudice" requirements so as to exempt him from the operation of the state procedural waiver rule requiring a timely challenge to the composition of a jury; and

2. Whether the district court erred in finding that the evidence of "other crimes" admitted at appellee's trial denied him his right to a fundamentally fair trial.

Because it is necessary to remand this case to the district court for an evidentiary hearing on the first issue, we pretermit review of the second issue until the case is returned to us by the district court.

In this application for federal habeas corpus, Amadeo alleged the grand and petit jury list in Putnam County, Georgia, were unconstitutionally composed at the time of his indictment and trial, in violation of his due process rights under the Fifth and Fourteenth Amendments.

In an unrelated civil action in 1978, a federal court[2] had determined that the jury selection procedures employed in Putnam County were intentionally designed to underrepresent black citizens and women in an unconstitutional manner. *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D. Ga. Aug. 15-17, 1978).

A timely jury challenge is required by Georgia law. *See* O.C.G.A. § 15-12-162. Failure to make a timely objection results in a waiver of the claim. A valid state procedural rule, resulting in a default, cannot be asserted

[1] Both Amadeo and the State agreed that an evidentiary hearing was not required.

[2] The district judge in that case, *Bailey v. Vining*, was the same district judge who heard and granted the instant habeas petition.

in a federal habeas corpus position without showing of "cause and prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 89-90, 97 S.Ct. 2947, 53 L.Ed.2d 594 (1977).

The district court, recognizing the applicability of the "cause and prejudice standard," found that there had been no deliberate bypass in this case.[3] The district court stated:

> Petitioner's failure to assert this issue at trial was not deliberate. Petitioner's counsel, looking at the statistics at the time of trial, was justified in assuming that an attack upon the jury would be futile. It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted this claim on direct appeal to the Georgia Supreme Court, years before federal action was first filed. That court in its discretion declined to find sufficient cause under analogous state law to excuse the waiver. As a matter of constitutional law, this court is not bound by that decision, this court continues to be appalled by the manner in which the Putnam County Jury Commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation—and hand selection of those blacks who did serve—on the basis of rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court

[3] The district court stated, "the case and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as 'sandbagging.'" (citations omitted). "Where there has been no deliberate bypass, . . ., and correction of the error is necessary to avoid a miscarriage of justice, the cause and prejudice test is satisfied." (citations omitted).

also to grant the writ on the basis of a unconstitutionally composed grand and petit jury.

The state argues that the district court's finding of "cause and prejudice" should be reversed because Amadeo failed to make the necessary objection. Further, the state insists that the district court's reliance on *Bailey v. Vining* constituted an incorrect interpretation and application of the "cause and prejudice" standard. The thrust of the state's argument is that deliberate bypass is not the applicable standard, but rather the court should have inquired whether the facts or law underlying the defaulted claim were discoverable to Amadeo's attorney.[4]

As the district court correctly noted, the "cause" requirement for noncompliance with a state contemporaneous objection rule was designed to eliminate the possibility of "sandbagging" by defense lawyers, and to reduce the possibility that the federal court will decide a constitutional issue without the benefit of the state's views. *Sykes, supra*, 433 U.S. at 89-90; *Ford v. Strickland*, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir. 1983). Cause sufficient to excuse a procedural default is designed to avoid a miscarriage of justice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B 1981), *Smith, supra*, 715 F.2d at 1470.

Bailey v. Vining, supra, was decided after Amadeo's conviction. Immediately after the district court decided *Bailey v. Vining*, appellee's counsel asserted this claim in his direct appeal to the Georgia Supreme Court, long before a federal habeas petition was ever filed. The Georgia Supreme Court, declined to find sufficient "cause" under state law to overcome the failure to make a timely

[4] By analogy, the state makes use of the case of *Smith v. Kemp, supra*, in which the panel held that ignorance of recently decided Supreme Court cases regarding jury composition claims did not establish "cause."

challenge. *Amadeo v. State, supra*, 255 S.E.2d at 718. Despite the ruling of the Georgia Supreme Court, the district court determined that there was no "sandbagging" and that to overlook the intentional underrepresentation would "indeed be a miscarriage of justice."

As the Supreme Court has recently stated, "[b]ecause of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term 'cause' precise content." *Reed v. Ross*, —— U.S. ——, 104 S.Ct. 2901, 2909 (1984). The Court stated that counsel may not intentionally ignore state procedural rules, hold back constitutional claims, and then attempt to secure federal habeas relief. To allow such actions would undermine the policies of comity and finality beyond the "cause and prejudice" requirement. *Id.* However,

> the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

102 S.Ct. at 2909.

In the final analysis, the decision whether to grant federal habeas corpus relief despite a state procedural default lies within a federal court's equitable discretion. *Reed, supra*, 102 S.Ct. at 2907. The state's interest in finality, standing alone, is not sufficient reason for a habeas court to compromise its protection of constitutional rights under § 2254. *Id.* at 2909.

In *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) the Court made clear that "cause" and "actual prejudice" are not rigid concepts. 102 S.Ct. at 1575. "In appropriate cases those principles [of com-

ity and finality underlying the cause and prejudice requirement] must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 1576. "[W]e are confident that victims of a fundamental miscarriage of justice will meet the cause and prejudice standard. . . ." *Id.*[5]

The district court did not hold an evidentiary hearing on "cause and prejudice." Rather, based upon his knowledge of the jury selection system used in Putnam County due to the fact that he was the district judge in *Bailey v. Vining*, he found "cause and prejudice" and granted the writ. Neither Amadeo nor the state believed that an evidentiary hearing was necessary to decide the issue. Additionally, both parties fully briefed the issue of "cause and prejudice" in their respective briefs in support of the petition for the writ of habeas corpus and in the brief in support of the state's response.

Regardless of the parties failure to request a hearing, we remand the case to the district court for an evidentiary hearing on the issue of "cause and prejudice." The record in its present state is not sufficiently developed to allow us to properly review the claim. To fulfill the causation prong of the *Engle v. Isaac* test, it is necessary for petitioner to establish that the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass. To make the necessary judgment on this issue, it is necessary for the record below to reflect the nature of the system used to select grand and petit jurors in Putnam County for the time in question. There is reference in the court's opinion in *Bailey*

[5] In *Harris v. Spears*, 606 F.2d 639 (5th Cir. 1979), a panel of the former Fifth Circuit said that a determination of whether there was cause "turns on whether a finding of cause safeguards against a 'miscarriage of justice,' . . . and whether it can be presumed that no strategic advantage can be gained from failure to comply with the procedural rule." *Id.* at 664 (citations omitted).

v. Vining, *supra*, to a memorandum written by someone in the prosecutor's office to jury commissioners instructing them how to intentionally underrepresent blacks but yet minimize constitutional challenges. However, the reference is somewhat opaque and the defects the court found in the system are not specific. The specifics of the alleged unconstitutional method of selecting the jurors and whether this method was so devious and hidden as to be non-discoverable can assist the district court, and ourselves on review, to determine whether there was sufficient "cause" to excuse petitioner's procedural default.[6]

We retain jurisdiction of this case and remand to the district court for the limited purpose of that court conducting an evidentiary hearing to determine the causation issue heretofore described.

REMANDED.

[6] There does not appear to be any dispute as to "prejudice." The state does not seem to contest the district court's finding that the jury selection procedures used in Putnam County at the time of Amadeo's trial were unconstitutional. Thus, "prejudice" would seem to be satisfied. The relevant issue appears to be the "cause" requirement.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

TONY B. AMADEO

v.

RALPH KEMP

ORDER & MEMORANDUM DECISION

THE COURT: Of course, you all do not have a disagreement on the facts. The Circuit Court stated that the record did not reflect the nature of the system used to select grand and petit jurors in Putnam County for the time in question. In *Bailey v. Vining*, this Court on the civil side went into the totality of circumstances in the County. I recall specifically during that case the records of the Registrar were produced and we discovered to this Court's dismay that at the time in question in this County, in spite of all of the decisions of the Supreme Court of the United States, we had voting registration cards kept separately by race and we had the records, that is, the qualified voters' list for each election still being kept racially separate in this County. And, of course, all of that, those records were the source of the master jury list which was the subject of the memorandum from the District Attorney's office. So, if you view it in its totality, this was a case of intense discrimination on the part of your governmental officials in this County. In other words, those governmental officials included the personnel in the Registrar's Office, who, if I recall correctly, were all white, keeping segregated lists; included the personnel in the District Attorney's office; I've forgotten how many of the identity from a racial and sex standpoint of your Jury Commissioners. I seem

to recall they were all white and maybe, all men. I'm not certain of that. It's in the file somewhere. But anyway, that was the situation in this County at the time in question, at the time that Mr. Amadeo was being prosecuted.

This Court is troubled over the fact that at that time, it was the system in our state courts to appoint lawyers and who really were expected to serve on almost a voluntary basis. The compensation was so minimal that we'd have to say they were volunteer counsel. I know that; I was appointed to serve in murder cases. That was a matter of common knowledge. But anyway, that was the system; whether we like it or dislike it, is immaterial. I know as a matter of my own common experience, as confirmed by Mr. Lambert, that appointed lawyers who were making their living off of other things didn't feel free in your smaller communities to go and challenge the composition of the jury. A challenge to the composition of the jury reflected upon the Jury Commissioners; reflected upon the Judge who appointed them; reflected upon the Clerk of the Superior Court; it reflected upon those who ran the County and whether we want to admit it or not, there was a feeling among members of the Bar, that if you were at odds with the power structure in the County, that you didn't do well as a practicing lawyer. That was a reasonable assumption. I think that's just a matter of historical fact in your smaller communities throughout the State. Of course, the undisputed facts show that neither Mr. Prior nor Mr. Lambert were aware of the challenge that had been made by the former District Attorney's law partner, his stepson, and which precipitated an addition to the jury box, not a total revision but an addition to the jury box, which was patterned along the lines of memorandum prepared by the District Attorney's office, the then District Attorney's office. My best recollection of the facts as they were disclosed before this Court in August of 1978, is that the composition of the box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,'

and they did it. And that's what you would expect of lay jury commissioners. They followed the advice that they got. Of course, we all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed. Now, of course, the Circuit Court opinion and the prior opinions of this Court have not, from a cause standpoint, dealt with the obligation of the prosecution along the *Brady* lines, but as I've listened to all of this, I thought, gee, that's obviously a factor to be considered. The prosecuting attorney had a duty not only to prosecute, but to square with opposing counsel and with the Court. The prosecuting attorney is supposed to tell the good and the bad, and of course, in this case, we don't know what the prosecuting attorney's thoughts were because they have never been gone into but it's obvious he did not volunteer prior to the hearing in this Court, that he had directed the Jury Commissioners in how to compose the box.

I think from a cause standpoint, that as I've listened to the whole situation, that it was reasonable for Mr. Lambert and Mr. Prior at the time that they were appointed, to not challenge the list. I likewise think that if they had known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so.

Now, under the more recent Supreme Court decisions, of course, whether that would have made any difference in the outcome is something none of us could know. It's a human equation. When you get twelve different people, none of us could foresee what those twelve people would do versus the twelve people who were selected. I think that's why there has been such an emphasis though upon there being a constitutionally-composed box. The least the courts can do is to insure that the master jury list from which jurors are selected is constitutionally composed.

So, I think in this case that on the issue of cause, that there was more than adequate cause for the failure to challenge and that the adequate cause was ignorance on the part of these lawyers and I think that ignorance is an adequate excuse for the issue not being raised. I don't think it was a deliberate by-pass in any sense, and I think it's an issue that is therefore not barred by the State's proceeding, rule or by the decisions of the Eleventh Circuit in this case.

So, what I will ask the Court Reporter to do is simply type up these remarks and I will make this report to the Eleventh Circuit for them to then deal with the case further.

SO ORDERED, this 14th day of November, 1985.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
Chief Judge
United States District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY B. AMADEO

v.

RALPH KEMP, WARDEN

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal is before this panel for the second time. The petitioner-appellee, Tony B. Amadeo, a Georgia state prisoner under sentence of death,[1] sought a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court granted the writ, concluding (1) that the introduction of "other crimes" evidence rendered Amadeo's trial fundamentally unfair and (2) that minority groups were underrepresented on the master jury lists in Putnam County, Georgia, the location of Amadeo's trial. In the first appeal, we remanded the case for a hearing to determine whether Amadeo could establish sufficient "cause" to excuse his failure to challenge the jury lists at the trial as required by Georgia law. We reserved judgment on the "other crimes" evidence issue. *Amadeo v. Kemp*, 773 F.2d

[1] Amadeo was convicted of murder and attempted armed robbery in the Superior Court of Putnam County, Georgia on November 30, 1977. The pertinent factual and procedural history of this case is contained in our first opinion. *Amadeo v. Kemp*, 773 F.2d 1141, 1142 (11th Cir. 1985) (per curiam) and in the opinion of the Supreme Court of Georgia, *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979).

1141 (11th Cir. 1985) (per curiam). On remand, the district court conducted a hearing and determined that sufficient "cause" existed to excuse Amadeo's procedural default. The case is now back before us to resolve both issues on the merits. We find that Amadeo has not established sufficient "cause" to excuse the procedural default and that the introduction of the "other crimes" evidence did not deny him a fair trial in violation of his due process rights. Accordingly, we reverse the judgment of the district court.

I.

The district court first held that Amadeo's right to a fundamentally fair trial was violated by the admission of evidence of other crimes. This evidence established that Amadeo by his own admission made in the form of a statement to the police, had been involved in a robbery and homicide in Colbert County, Alabama on September 28, 1977, the night prior to the murder and attempted robbery in Putnam County, Georgia, which occurred at approximately 8:30 A.M. on September 29, 1977. *See* Record on Appeal, Exhibit I, Vol. II. pp. 200-02.

On direct appeal, the Supreme Court of Georgia approved the admission of this evidence, finding that it met the Georgia standard for the admissibility of similar crimes evidence.[2] The supreme court also noted that the trial court instructed the jury that such evidence could be considered only to illustrate Amadeo's state of mind at the time of the Putnam County homicide and for no other reason. *Amadeo v. State*, 243 Ga. 627, 629, 255

[2] As stated in *French v. State*, 237 Ga. 620, 621, 229 S.E.2d 410, 411 (1976), the first criterion for the admission of evidence of independent crimes is that the defendant must be shown to have been the perpetrator of the independent crime. The second requirement is that there be a sufficient connection between the independent crime and the offense charged so that the proof of the former tends to prove the latter. *See also Felker v. State*, 252 Ga. 351, 359, 314 S.E.2d 621, 631, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

S.E.2d 718, 720, *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). Therefore, the Supreme court held that the admission of the evidence, for that limited purpose, was a recognized exception in Georgia to the general rule against the admissibility of evidence of other criminal activities.[3]

The district court found that it was unnecessary for the State to introduce this evidence to establish identity, motive or intent to rob or to rebut Amadeo's defense of an accidental shooting, and consequently ruled that the evidence was inadmissible and nothing more than prosecutorial overkill. The court reached this conclusion because at the time the state trial judge considered Amadeo's motion to exclude this evidence, the State had a written confession signed by the appellee.[4] Also, an

[3] The Georgia Supreme Court concluded that the evidence was probative of motive, i.e., that the Alabama and Georgia crimes were committed for the same reason, to obtain money while Amadeo was AWOL from the United States Marine Corps. *Amadeo v. State*, 243 Ga. at 629, 255 S.E.2d at 720.

[4] The confession recited:

> Last night Gemini, Bill and I slept in my car, a 1977 Monte Carlo, in a roadside park somewhere on the other side of Atlanta. This morning, Thursday, 9/29/77, we drove around in Georgia on some back roads looking for a little store to hit. Bill was driving when we spotted an old man in a brown pickup truck dumping trash in a dumpster. We passed by him and turned around to come back. When we got back, we turned around again and pulled up beside the truck. I got out of the back seat with a .22 automatic. I walked up to the truck and I asked him for his money. He said he didn't have none. I said yeah, you do. Then that truck [driven by Talmadge Holder], it had a white cab and steel sides, pulled up. The man was still in the back of the pickup. Then I shot him. I shot one time. The man grabbed his chest and kind of slid off the right side of the truck to the ground. He turned and yelled for help and started for that other truck. I just ran for our car. Gemini had got in the back seat so I got in the front. We took off.

Record on Appeal, Exhibit I, Vol. II, p. 225.

eye-witness identified Amadeo as the person who fired the fatal shot and there was conclusive ballistics testimony.[5]

In our view, this is not the proper inquiry in a federal habeas corpus proceeding. In considering state evidentiary objections, a federal court exercises limited review. The evidentiary error must have been "of such a magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.),[6] *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). *See also Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984) (per curiam), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). In determining whether the admission of prejudicial evidence constitutes a denial of fundamental fairness, a federal court must decide whether the evidence is "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d at 401. *See also Osborne v. Wainwright*, 720 F.2d 1237, 1238-39 (11th Cir. 1983) (per curiam).

We reject the district court's reasoning for several reasons. First, the Supreme Court of Georgia expressly ruled that the evidence was properly admitted under state law, a determination that is binding on this court as well as the district court. Since introduction of this evidence was relevant as a matter of Georgia law, we cannot say that its admission denied Amadeo fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir. 1983) (per

[5] However, counsel for Amadeo maintained in opening and closing argument that the confession was involuntary and that the shooting was accidental. While no evidence was introduced by the defense on this issue, the potential for such defenses remained at the time of the admission of the "other crimes" evidence.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

curiam), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984).

Even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Amadeo's guilt of the Georgia murder defeats his argument that evidence of the Alabama crimes constituted a "crucial, critical, highly significant factor" in the case against him.

In any event, the overwhelming nature of the other evidence establishing Amadeo's guilt would render any constitutional error harmless beyond a reasonable doubt. *See Rose v. Clark*, —— U.S. ——, ——, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986):

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt byond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'

See also Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

II.

The district court also predicated its grant of the writ on its finding that the 1977 master jury lists in Putnam County underrepresented women and blacks, depriving Amadeo of his equal protection rights. Amadeo did not attack the composition of the jury lists at the trial; he first raised the issue on direct appeal to the Supreme Court of Georgia. That court refused to address this assignment of error because of Amadeo's failure to complain of this possible infirmity at the time of trial. The district court excused this procedural default, finding

that Amadeo was prevented from making out a prima facie case of jury discrimination by the conduct of Putnam County officials. Before reaching the merits of the jury composition issue, we must first examine Amadeo's failure to challenge these jury lists during his state court trial and the district court's conclusion that cause existed to forgo this challenge.

A federal habeas corpus court will not consider an issue if the petitioner did not pursue that issue in the state court and thereby committed a procedural default, unless he can overcome this bar by showing cause for and actual prejudice from the default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976). Georgia law clearly requires a criminal defendant to make a timely jury challenge at the trial. *See* O.C.G.A. §§ 15-12-162, 9-14-42(b). It is also undisputed that Amadeo failed to make such a timely challenge and that this failure constituted a procedural default under Georgia law. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720. Consequently, our inquiry turns to whether Amadeo can overcome this procedural bar by demonstrating sufficient "cause" and "actual prejudice."

Because federal courts must analyze "cause" under a wide variety of circumstances, no court has yet accorded that term a precise definition. Rather, guidance is provided by the policy rationale for the "cause" requirement. The avowed purpose of this requirement is to preserve the integrity of state judicial procedures and to bind a defendant to the tactical decisions of competent counsel, absent a miscarriage of justice. *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, 13 (1984); *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 518, 78 L.Ed.2d 699 (1983).

> In general, therefore, defense counsel may not make a tactical decision to forgo a procedural opportunity —for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court.
>
> ....
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.

Reed v. Ross, 468 U.S. at 14, 104 S.Ct. at 2909, 82 L.Ed. 2d at 13-14.

The Supreme Court furnished further instruction on this point in a recent decision:

> [W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objecitve impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, —— U.S. ——, ——-——, 106 S.Ct. 2678, 91 L.Ed.2d 427 (1986).

We remanded this case to the district court to make the inquiry outlined in *Reed*. "To fulfill the causation prong . . . it is necessary for petitioner to establish that

the defects in the jury composition were not reasonably discoverable by his counsel and that the decision not to challenge the composition was not a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d at 1145. That hearing established the sequence of events relating to Amadeo's failure to challenge the jury lists.

Amadeo's trial counsel, William A. Prior and E.R. Lambert, testified that they considered making a challenge to the grand and petit juries and were aware that minorities were probably underrepresented in the Putnam County master jury lists. Record on Appeal, 2d Supp., pp. 8, 11-13, 20. However, after reviewing the petit jury venire with a local attorney, they elected not to pursue the challenge for various tactical reasons.

First, they were satisfied with the representation of blacks on the venire, which was approximately fifty percent. *Id.* at 10. One attorney stated that he would be reluctant to try the case with any more blacks on the venire because the State possessed evidence that Amadeo, a white male, had assaulted a number of blacks in Alabama and Mississippi. The lawyer feared that a jury heavily weighted with black jurors might become prejudiced against Amadeo if the State introduced this evidence at the trial. *Id.* at 12. Second, the attorneys were satisfied with the existing venire because it contained several members of a charismatic religious group that had shown some sympathy for the welfare of local prisoners. *Id.* at 13. Such individuals were viewed as less likely to impose the death penalty. *Id.* at 30. Counsel also were aware that these advantages might be lost if the venire was challenged and the master list was reconstituted. *Id.* at 9.

Amadeo's lawyers confirmed their decision to waive a jury challenge when the actual jury selected for Amadeo's case contained an even number of blacks and whites and a majority of women. *Id.* at 12, 35-36. As such, they made no challenge to either the grand or petit juries

and did not make an effort to examine the master jury lists. As one lawyer testified, "it was a tactical decision on our part not to challenge the array because of the fact that we had gone over the list with [a local attorney]; we felt like we had about as good a Jury List as we could get . . . . we made a tactical decision, a knowing, tactical decision not to challenge the array." *Id.* at 12-13.

After Amadeo was convicted and sentenced to death, and while his direct appeal was pending before the Supreme Court of Georgia, Christopher Coates, counsel in an unrelated civil suit, *Bailey v. Vining*, Civ. Action No. 76-199-MAC (M.D.Ga. Aug. 15-17, 1978),[7] discovered a 1977 memorandum from the county prosecutor advising the jury commissioners to add specified numbers of blacks to the lists. The memorandum was filed in the book containing the master jury lists and was available to anyone examing those lists. Record on Appeal, 2d Supp., pp. 41-42, 49-50. The district court characterized this memorandum as an effort to protect the jury lists from constitutional scrutiny by placing the names of enough blacks on the lists to preclude a prima facie case of jury discrimination, but still maintain as much racial disparity as possible.[8] Coates advised Amadeo's counsel of

[7] *Bailey v. Vining* was a voting rights action challenging the at-large election system used in Putnam County.

[8] Courts have indicated that a ten percent or smaller disparity between the proportion of a minority group in the relevant local population and its representation on jury lists is acceptable under the Constitution. Larger disparities may justify finding an equal protection violation. *See Swain v. Alabama*, 380 U.S. 202, 208-09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965); *Bowen v. Kemp*, 769 F.2d 672, 684-86 (11th Cir. 1985); *Preston v. Mandeville*, 428 F.2d 1392, 1393-95 (5th Cir. 1970). *See generally Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510-11 (1977) (elements of a prima facie case of jury discrimination).

After the Putnam County jury commissioners complied with the prosecutor's suggestion, the grand jury list underrepresented blacks by 10.7% and the petit jury list underrepresented blacks by 5.1%. *See* Record on Appeal, Petitioner's Exhibit 4.

this memorandum and they amended their appeal to include a challenge to the composition of the jury. As stated earlier, the Georgia Supreme Court declined to reach this issue because of the procedural default. *Amadeo v. State*, 243 Ga. at 629-30, 255 S.E.2d at 720.

The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey v. Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.[9]

We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury lists and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

[9] In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury. *See* Record on Appeal, 2d Supp., pp. 25-27, 46, 58-59, 62. These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.

Our decision finds support in a 1984 decision of this court. In *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), a Georgia state prisoner maintained that his trial counsel's failure to question the racial composition of the jury was unreasonable and thereby constituted "cause" excusing the procedural default as well as ineffective assistance of counsel. In that case, as here, the lawyer considered a jury challenge and made a preliminary inquiry into the composition of the jury. *Id.* at 598. He decided to abandon the challenge, again for tactical reasons. In the opinion of the attorney, the racial mix of the jury venire and the actual jury empaneled to try the case was advantageous to the defendant and this advantage might be lost in a jury drawn from a revised list. *Id.* at 598-99. We found counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600-01. *See also Straight v. Wainwright*, 772 F.2d 674, 677-78 (11th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

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[10] Since we conclude that Amadeo has failed to establish "cause" for his procedural default, we do not address the issue of "actual prejudice" or reach the merits of his jury challenge.

[11] Amadeo raised eight issues in his federal petition for habeas corpus. He claims that the jury lists were unconstitutional, that the admission of the "other crimes" evidence denied him a fair trial, that his confession was involuntary, that trial counsel was ineffective, that the trial court gave improper jury instructions on armed robbery, mitigating circumstances and the jury's right to recommend a life sentence, and that the Supreme Court of Georgia failed to properly evaluate the proportionality of his death sentence. The district court considered only the first two issues when it granted the writ. The failure to address the six remaining issues requires a remand for the resolution of these questions.

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

CLARK, Circuit Judge, dissenting:

This case involves a scheme by the county solicitor's office and the county jury commission to limit the number of blacks on grand and petit jury lists in Putnam County, Georgia. The scheme included a coverup intended to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in the prevailing case law. The majority holds that a defendant who did not learn of the underlying scheme until after his trial is barred from raising that claim in federal court because of procedural default. Such a result rewards the state for its underhandedness and stretches the doctrine of *Wainwright v. Sykes* beyond recognition. Accordingly, I dissent.

I. FACTS

We remanded this case to the district court for a hearing to determine whether "the defects in the jury composition were . . . reasonably discoverable by [Amadeo's] counsel and [whether] the decision not to challenge the composition was . . . a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d 1141, 1145 (11th Cir. 1985). After holding such a hearing, the district court found that petitioner had demonstrated sufficient "cause" for his failure to object at trial to the composition of the master jury list. Although the majority does not explicitly state the standard of review employed in this case, I assume the factual findings underlying the district court's legal ruling are accepted as true unless they are clearly erroneous.

At the evidentiary hearing, the state conceded that the county intentionally discriminated against blacks in the election of prospective jurors and that the prejudice prong of *Wainwright v. Sykes* was established. 2d Supp. Record, Vol. I at 67. The undisputed evidence of this discrimination was first presented in *Bailey v. Vining*, No. CIV 76-199-MAC (M.D.Ga. Aug. 17, 1978).

In *Bailey*, a civil case, plaintiffs challenged Putnam County's voter registration and juror selection procedures. Judge Owens, the district judge in the instant case, was also the judge in *Bailey*. As a result of *Bailey*, the county was required to revise its juror selection procedures. The following version of the pre-1978 jury selection procedures in Putnam County is uncontroverted.

1. *The Discriminatory Scheme.*

Prior to Amadeo's indictment, the Putnam County Solicitor's (now the District Attorney's) Office advised the county jury commission to recompile the grand and petit jury lists in a manner that would underrepresent blacks by a percentage just small enough to avoid challenges based solely on statistical evidence. Specifically, a memorandum from the prosecutor's office advised the commission to place the names of 101 blacks in the grand jury pool and 298 blacks in the petit jury pool. Petitioner's Exhibit 4.[1] Such racial precision was possible because the master jury list was drawn from voter registration cards which were kept in two separate groups, one for blacks and one for whites. The memorandum indicated that the percentage of blacks in the eligible population was 42.1%, and that the selection of 101 blacks for the grand jury list would raise the percentage of blacks on that list to 31.4%. In addition, blacks would constitute 37% of those on the petit jury list. The disparity between the percentage of blacks in the grand and petit jury pools and the percentage of blacks in the population would be 10.7% and 5.1%, respectively.

2. *The Coverup.*

The size of this disparity was sufficiently small to prevent a challenger of the jury lists from establishing a prima facie case of racial discrimination. *Compare Swain*

[1] The memorandum also suggested limiting the number of women and people under age 25 on the master jury lists.

v. Alabama, 380 U.S. 202, 208-09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 767 (1964) (10% underrepresentation not enough to establish prima facie case) with *Preston v. Mandeville*, 428 F.2d 1392, 1393-94 (5th Cir. 1970) (14.3% underrepresentation sufficient to establish prima facie case). The district court, relying in part on its work in a prior civil case against Putnam County, found that the district attorney's office memorandum suggested the 10.7% and 5% disparities in order to prevent defendants from establishing prima facie cases of discrimination. Record, Vol. I at 147.

The jury commissioners followed the advice in the prosecutor's memorandum. Thus, the pre-1978 jury lists in Putnam County were compiled according to racial quotas which are clearly unconstitutional. *See, e.g., Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839, 849 (1950).[2] More importantly for purposes of this case, the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pools appeared to be fairly integrated. Even if a challenge was made in any particular case, it was almost sure to fail because of a lack of proof. Only a defendant possessing direct evidence of intentional discrimination

[2] Although Amadeo is white and blacks were unconstitutionally excluded from the jury array, he nonetheless has standing to raise his challenge here; for, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." *Peters v. Kiff*, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). *See Duren v. Missouri*, 439 U.S. 357, 359 n. 1, 99 S.Ct. 664, 661 n. 1, 58 L.Ed.2d 579 (1979) ("A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class."); *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975) (male defendant had standing to raise "the claim that the exclusion of women from jury service deprived him of the kind of factfinder [sic] to which he was constitutionally entitled").

could hope to mount a successful challenge to the grand or petit jury.

3. *The "Smoking Gun."*

The testimony at the evidentiary hearing showed that Amadeo's attorneys did not know of the intentional discrimination by the jury commissioners until several months after Amadeo's trial. In early 1978, Amadeo's counsel was contacted by Christopher Coates, an attorney for the plaintiffs in a voting rights case against Putnam County. As part of his background research in the voting rights case, Coates surveyed "all the jury materials for a 20 to 30 year period." 2d Supp. Record at 42. Coates found the "smoking gun" memorandum from the district attorney's office somewhere in the middle of the mass of documents he obtained from the county clerk. 2d Supp. Record at 50.

Amadeo's counsel immediately incorporated the jury discrimination issue into his appeal to the Georgia Supreme Court. That court refused to entertain the claim because it had not been raised at trial. *See Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979), *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The district court, after hearing testimony from counsel, held that this issue was not barred from federal review because Amadeo had demonstrated cause for his failure to object at trial. The majority's reversal of that decision ignores the policies underlying *Wainwright v. Sykes*, and ignores the fact-finding role of the district court.

II. ANALYSIS

Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), announced the rule that federal habeas courts may not entertain procedurally defaulted grand jury challenges by state prisoners absent a showing of "cause" and "actual prejudice." The decision brought the law regarding procedural defaults by state

prisoners into line with the law regarding procedural defaults by federal prisoners. *See Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Federalism concerns required giving at least as much deference to state procedural rules as is given to the corresponding federal rules in federal courts. *Francis*, 425 U.S. at 541-42, 96 S.Ct. at 1711.

In *Wainwright v. Sykes*, 433 U.S. at 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Court extended the *Francis* "cause" and "prejudice" test to a case involving a failure to contemporaneously object to an error at trial. *Sykes* reiterated the federalism concerns of *Francis*, and gave several examples of how failure to honor the state's contemporaneous objection rules would be an affront to principles of comity. First, it might "encourage 'sandbagging' on the part of defense lawyers, who may take their chances of a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2508. Second, it might "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* at 90, 97 S.Ct. at 2508.

These comity based concerns need to be balanced against the role of the federal habeas court as a tribunal of last resort for state prisoners. Thus, the "cause" and "prejudice" test is designed to ensure the adjudication of federal claims in federal court where the failure to do so would result in a miscarriage of justice. *Id.* at 90-91, 97 S.Ct. at 2508. Consistent with this goal, "this court has . . . attempted to secure defendants who have not strategically withheld constitutional objections in state court from the possibility of injustice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B July 1981).

As the majority indicates, any attempt to define cause must take into consideration the federalism principles

identified in *Sykes* as well as the overriding duty of the federal habeas court to avoid manifest injustice. *Ante* at 1505. On the facts of this case, both of these factors lead me to the conclusion that Amadeo has demonstrated cause for his failure to raise his jury challenge at the trial level.

The most important comity concerns discussed in *Sykes* simply are not involved in this case. The district court found that Amadeo's counsel did not "deliberately bypass" the state trial court. 1st Supp. Record, Tab. 16 at 5. There is no evidence of "sandbagging." At the time of trial, counsel had no reasonable basis for challenging the master jury lists. Since the "smoking gun" memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal habeas "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

The majority suggests, *ante* at 1506-1507, that Amadeo's counsel (William Prior and Roy Lambert) considered an objection to the jury array but decided, as a matter of tactics, to proceed with the jury that was picked. This argument misses the mark for several reasons. First, the claim which counsel considered at trial was a challenge to the composition of the jury array based on *statistical underrepresentation*. One can hardly fault Amadeo's attorneys for rejecting such a challenge, since the racial composition of the array did not suggest a sufficient underrepresentation of blacks to warrant much concern. Indeed, the unconstitutional jury selection process had been specifically designed to withstand challenges based on statistical evidence. Under these circumstances, counsel's pretrial discussions regarding a possible statis-

tical challenge should not preclude Amadeo from raising a claim based on (newly discovered) direct evidence of intentional discrimination in the juror selection process.

Second, a challenge to the jury array is not the same as a challenge to the master jury list. At the evidentiary hearing, Amadeo's counsel noted that the actual array chosen for Amadeo's trial appeared to be fairly integrated. What counsel could not see by looking at the array was that the array was chosen from a master list which was specifically designed to underrepresent blacks. The infection of the selection system at the master list level is not cured by the random selection of arrays from that master list. Once the master list is affected by discriminatory selection procedures, the juries chosen from that list are tainted. It is nearly impossible to predict what type of jury would have been selected if the master list had been compiled in a constitutional manner. Nor is it certain how such a jury would have decided this case. For these reasons, the Supreme Court has indicated that, where the jury has been chosen according to racially discriminatory procedures, prejudice to the defendant is presumed. *See Peters v. Kiff*, 407 U.S. 493, 504-05, 92 S.Ct. 2163, 2169, 30 L.Ed.2d 83 (1972); *cf. Rose v. Mitchell*, 443 U.S. 545, 550-59, 99 S.Ct. 2993, 2997-3002, 61 L.Ed.2d 739 (1979) (discrimination in selection of grand jury not rendered harmless by subsequent conviction by petit jury).

Third, the majority ignores important factual findings made by the district court. After hearing testimony from Amadeo's counsel, the court found that the pressures of being a lawyer in a small rural community served as an effective deterrent against raising claims of jury discrimination. Such claims would necessarily impugn the integrity of county officials, and would jeopardize the lawyer's standing in the community. 1st Supp. Record, Tab 16 at 2. Notwithstanding these community pressures, the court concluded "that if [counsel] had

known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so." *Id.* at 4. This finding clearly indicates that counsel did not make a strategic decision to hold back the jury claim in the hopes of obtaining a favorable verdict at trial.

A second comity concern stressed in *Sykes* is the desire to ensure that the trial remains the "main event" in the criminal process. This concern is most important where a defendant deliberately bypasses the opportunity to raise an available claim at trial. It is even relevant where counsel's failure to raise the issue was the result of negligence. *See Murray v. Carrier*, —— U.S. ——, 106 S.Ct. 2639, 2645-46, 91 L.Ed.2d 397 (attorney "inadvertence" or "ignorance" does not constitute cause under *Sykes*). By refusing to entertain claims "negligently" bypassed, federal courts provide an incentive to the bar to exercise the utmost care in recognizing and raising meritorious claims at trial.

The above concern is irrelevant, however, where neither the defendant nor his counsel were at fault for the procedural default. *See Reed v. Ross*, 468 U.S. 1, 14-16, 104 S.Ct. 2901, 2909-10, 82 L.Ed.2d 1 (1984).[3] The ma-

[3] For this reason the majority's reliance on *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), is misplaced. In *Birt*, the only asserted "cause" for failing to raise the jury claim was that counsel rendered ineffective assistance. We *rejected* the ineffectiveness claim and thus found there was no "cause for the defendant's failure to object at trial. *Id.* at 596-601. In the instant case, Amadeo does not allege his attorneys were ineffective for failing to raise the jury claim. Amadeo claims counsel could not have raised the claim at trial because the evidence of intentional discrimination was not discovered until after trial. Furthermore, he argues his attorneys lacked sufficient evidence to challenge the jury on the basis of statistical underrepresentation. The allegations of state misconduct in concealing the constitutional violation are sufficient to distinguish this case from *Birt*.

jority suggests counsel was "at fault" because the "smoking gun" memorandum which set forth the country's plan to rig the jury lists was "readily discoverable in the county's public records." *Ante* at 1507. Further, the majority speculates that "[h]ad counsel elected to examine the jury lists, they would have found the memorandum." *Id.*

The majority's "factual findings" are troubling for several reasons. First, there simply is no factual support in the record for the proposition that the memorandum was "readily discoverable" or that Amadeo's counsel "would have found the memorandum" if they had looked. Christopher Coates, the attorney who found the memorandum, testified that he was conducting a broad investigation as to whether blacks historically had been underrepresented in Putnam County. As part of his research, he set out to survey all of the jury materials for a twenty to thirty-year period. Although he did not recall precisely where he found the incriminatory memorandum, he remembered that "it was not on the first page of the materials I was perusing, but somewhere in the stack of materials [that the county clerk] gave me . . . it wasn't on top. I found it because I was going through all the materials." 2d Supp. Record at 41, 50. This testimony belies the majority's assertion that the document was "readily available." Furthermore, it is not at all clear that a search by counsel would have led them to this document. The majority does not suggest counsel should have reviewed twenty years worth of documents as part of their pretrial preparation in this case. It is at least as reasonable to assume counsel would have reviewed only the current jury lists. Since the memorandum was found in the middle of a stack of older documents, I find the majority's factual inferences to be unreasonable.

Moreover, even if there had been no obfuscatory behavior by county officials, it is unreasonable to expect

counsel to conduct a detailed search of the county court records. By its holding, the majority deprives petitioner of a forum for his claim because his attorneys, who were facing the usual rigors of pretrial preparation in a capital case, did not find the time to scour the public records in search of evidence of intentional discrimination. Such a ruling ignores the realities of capital defense work and, more importantly, is not necessary to ensure that the trial is the "main event" in the criminal process. Absent some reason to suspect jury tampering (such as statistical evidence of underrepresentation), defense counsel would almost never be able to afford the luxury of examining all "publicly available" documents for favorable evidence. This realization is the basis for the holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring prosecutorial disclosure of evidence favorable to defendant). Defense counsel must be able to rely on the candor of the prosecutor's office. Where the prosecutor's office is a party to the scheme to underrepresent blacks on jury lists, it is particularly unreasonable to expect defense counsel to uncover such malfeasance.

In this respect, this case is analogous to *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In *Reed*, the Court held that "where a constitutional claim is so novel that its *legal* basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16, 104 S.Ct. at 2910 (emphasis added). In the instant case, the *factual* basis of Amadeo's constitutional claim was not reasonably available to counsel. In such a case, as in *Reed*, "it is safe to assume that [counsel] is sufficiently unaware of the [constitutional] question's latent existence that we cannot attribute to him strategic motives of any sort." *Id.* at 15, 104 S.Ct. at 2909-10.

Finally, I cannot ignore the fact that the county did its best to conceal this constitutional violation. The dis-

criminatory scheme was carefully designed to achieve the maximum underrepresentation of blacks without allowing criminal defendants to use the statistical disparity to establish prima facie cases of jury discrimination. The only direct evidence of this scheme was buried somewhere in a stack of documents in the county clerk's office. Under the circumstances, certainly it is no coincidence that this evidence was discovered by an attorney conducting discovery in a civil case. Without the benefit of a prima facie case, criminal defendants and their counsel are unlikely to undertake massive investigations to uncover direct evidence of intentional discrimination.

The fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county. Recent decisions by the Supreme Court and by our court provide support for the proposition that such misconduct by the state can constitute "cause" for failure to raise an issue at trial. In *Murray v. Carrier*, —— U.S. ——, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Court noted that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at ——, 106 S.Ct. at 2646. We have applied this language to excuse default under circumstances significantly less compelling than those in the present case. In *Dorman v. Wainwright*, 798 F.2d 1358 (11th Cir. 1986), the defendant dismissed his direct appeal in state court because he had not received a transcript of his trial. Under state law, the defendant's voluntary dismissal of his appeal barred him from further review of alleged trial errors. However, since it was the state's responsibility to furnish the transcript, we found it unnecessary to apply the state's procedural default rule in federal court:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal.

Id. at 1370. It is inconceivable to me that the state misconduct in the present case would not constitute "cause" while the failure to provide a transcript would suffice to make such a showing. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71-72 (5th Cir. 1979) (where defense counsel was misled to believe missing witness would be unfavorable, defendant could not be held responsible for counsel's failure to make attempts to locate that witness), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964) (where defense counsel was misled into thinking ballistics test results supported state's theory, counsel's failure to make a specific request for the test results was excused).

The misconduct in this case is particularly egregious because the county prosecutor's office initiated the discriminatory scheme. The prosecutor's knowledge of the prevailing standards for establishing a prima facie case of jury discrimination was the key to the effective concealment of the discriminatory scheme. The prosecutor's office is under a special duty to be candid in criminal cases and I would hope that this duty would be scrupulously honored where the defendant's life is at stake. The thought of one arm of the prosecutor's office suggesting methods to shield unconstitutional jury selection processes while another arm of the prosecutor's office argues to this court that defense counsel should have searched the public records for evidence of the scheme is unconscionable.

In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the

state should not be allowed to rely on its procedural default rules to preclude federal habeas review. *See Freeman, supra.* Such a result is not required by *Sykes*, nor is it permitted under our prior cases.

Because I believe Amadeo has shown "cause" for his failure to raise the jury issue at trial, and because the existence of "prejudice" is uncontested, I would affirm the district court's order granting the writ in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 30, 1987)

(June 8, 1987)

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

(×) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Title Omitted in Printing)

Before VANCE and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

CLARK, Circuit Judge, dissented and filed an opinion.

Entered: April 30, 1987

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Jun. 16, 1987

SUPREME COURT OF THE UNITED STATES

No. 87-5277

TONY B. AMADEO,
Petitioner,

v.

RALPH KEMP, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1987

Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where a prosecutor secretly directs jury commissioners to underrepresent black people and women on the grand and petit jury pools, and deliberately obscures *prima facie* evidence of the discrimination for the purpose of avoiding detection and judicial review, is a federal court barred from considering the merits of a post-conviction claim due to trial counsel's unknowing failure to object to the pools before indictment and trial as required by state law?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the District Court's grant of habeas corpus relief is reported as *Amadeo* v. *Kemp*, 816 F.2d 1502 (11th Cir. 1987), and is reproduced in the Joint Appendix (J.A.) at 94. The previous decision of the Court of Appeals vacating the District Court's earlier grant of habeas corpus relief is reported as *Amadeo* v. *Kemp*, 773 F.2d 1141 (11th Cir. 1985), and is reproduced in the Joint Appendix at 82.

The two opinions of the District Court are not reported, but appear in the Joint Appendix at 71 and 90. The opinion of the Georgia Supreme Court on direct appeal, in which the Court declined to address the jury discrimination claim, is reported as *Amadeo* v. *State*, 243 Ga. 627, 255 S.E.2d 718 (1979), and appears in the Joint Appendix at 66.

JURISDICTION

The decision of the Court of Appeals was rendered on April 30, 1987. The Court of Appeals denied Mr. Amadeo's timely petition for rehearing on June 8, 1987. Mr. Amadeo's petition for a writ of certiorari was docketed in this Court on August 10, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

This case also involves 28 U.S.C. § 2254 (1982), which provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of treaties of the United States.

STATEMENT OF THE CASE

Tony B. Amadeo was "indicted, tried and sentenced [to death] by unconstitutionally composed juries" in Putnam County, Georgia in November, 1977. Order of the District Court, J.A. 78. The District Attorney's office which prosecuted him had instructed the jury commission to underrepresent black people and women on the master jury lists from which the grand and petit juries were drawn. However, this discrimination and the District Attorney's involvement in it were not known to Amadeo and his attorneys at the time of his trial.

Immediately upon learning of it—when the prosecution's handwritten directive to the jury commissioners was found by an attorney in another case in a mass of documents in the office of the clerk of court—Mr. Amadeo raised the issue in his brief on direct appeal to the Georgia Supreme Court. However, that Court refused to consider the issue because it had not been raised pretrial. *Amadeo* v. *State*, 243 Ga. 627, 629-30, 255 S.E.2d 718, 720 (1979), *cert. denied*, 444 U.S. 974 (1979).

The District Court below granted habeas corpus relief, finding that because of the prosecution's concealment of its actions, the claim was not reasonably available to Mr. Amadeo's defense counsel prior to trial, and, therefore, there was "cause" for the failure to raise the issue at that time. J.A. 92-93.

In a 2-1 decision, the Court of Appeals for the Eleventh Circuit rejected the finding of cause and found the claim procedurally barred under this Court's decisions in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and *Francis* v. *Henderson*, 425 U.S. 536 (1976). *Amadeo* v. *Kemp*, 816 F.2d 1502 (11th Cir. 1987), J.A. 103. The dissent argued that the majority's decision "rewards the state for its underhandedness and stretches the doctrine of *Wainwright* v. *Sykes* beyond recognition." 816 F.2d at 1508, J.A. 106 (Clark, J., dissenting). This Court granted certiorari on October 19, 1987.

A. The Discriminatory Scheme and its Concealment

Georgia law provides that a jury commission, composed of six members appointed by the judge of the Superior Court and the clerk of the court as secretary, is to select "upright and intelligent citizens" to serve as jurors. Off. Code of Ga. Ann. (O.C.G.A.) § 15-12-40 (1985). The jury commissioners compose two master jury lists, one from

which the grand jury is selected and another from which the venires for petit juries, called traverse juries in Georgia, are selected.

The grand jury which indicted Mr. Amadeo and the traverse jury which tried him and sentenced him to death were drawn from master jury lists composed by the Putnam County Jury Commission in accordance with a handwritten directive from the District Attorney.[1] The District Attorney's note instructed the commission on exactly how to underrepresent blacks and women on the master jury lists. J.A. 2-4.

The note directed the commissioners to limit the number of black persons on the grand jury list to 101 of the total of 322 persons on the list. The note indicated that the percentage of blacks in the eligible population was 42.1 and that the selection of 101 blacks would result in a percentage of 31.4 blacks on the list. J.A. 3. Thus, black people would be underrepresented by an absolute disparity of 10.7 percent. The note directed the commissioners to underrepresent blacks by 5.1 percent on the traverse jury list. J.A. 3.

The District Court found that these disparities were set to insulate the discrimination from challenge based upon an inference of discrimination raised by the size of the disparity under the decisions of this Court and the Court of Appeals for the Fifth Circuit. J.A. 78. *Compare Swain* v. *Alabama* 380 U.S. 202, 208 (1965) (purposeful discrimination cannot be inferred from ten percent disparity)

---

[1] The term "solicitor" appears frequently in the record because the title of the position changed from solicitor to district attorney on July 1, 1977, just a few months before Mr. Amadeo's trial. O.C.G.A. § 15-18-1 (1985). The term "district attorney" will be used throughout this brief.

with Whitus v. *Georgia*, 385 U.S. 545, 552 (1967) (16 percent disparity establishes prima facie case and shifts burden of proof to state); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972) (14.6 percent disparity establishes prima facie case); *Preston* v. *Mandeville*, 428 F.2d 1392 (5th Cir. 1970) (13.3 percent disparity constitutes prima facie case).

The jury commissioners complied with the directive. The District Court found that "the composition of the [jury] box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,' and they did it." J.A. 91-92.

Following revision of the grand and petit jury list in accordance with the prosecutor's plan, Mr. Amadeo and two other persons were indicted on October 3, 1977, and charged with a homicide occurring in the course of an attempted robbery which happened on September 29, 1977. At the time, Mr. Amadeo was 18 years of age and serving in the United States Marine Corps. Two lawyers were appointed to represent him and his two codefendants.

Counsel for Mr. Amadeo filed a demurrer seeking to quash the indictment. In late October, counsel moved for a change of venue, asserting that "the public mind has been so poisoned and prejudiced by exaggerated rumors in the newspapers and local press that Movants will be unable to get a fair trial by an impartial jury" in Putnam County. J.A. 62. Counsel also moved for a continuance, arguing that "[t]he case should not be allowed to proceed to trial before the third week of March, 1978, on account of the passions and prejudice engendered against the Defendants by the public communications media" as well as the need for time to prepare the cases of three defendants from Minnesota, Maine and Texas. J.A. 64-65.

However, counsel's efforts to quash the indictment, change the venue, or postpone the trial until another term of court were unsuccessful. Just two months after the offense, trial commenced on November 28, and Mr. Amadeo was sentenced to death on November 30, 1977.

At no time prior to trial were Mr. Amadeo's lawyers aware of the District Attorney's directive, J.A. 24, 33. As a result counsel did not comply with Georgia law that requires that grand jury challenges must be made prior to indictment, and challenges to the traverse jury must be made before the commencement of voir dire. O.C.G.A. § 15-12-162 (1985).

B. Discovery of the Scheme

In August of 1978, ten months after Mr. Amadeo's trial, the prosecutor's directive to the jury commissioners came to light in a federal action, *Bailey* v. *Vining*, which challenged the at-large voting procedures in Putnam County. Christopher Coates, an attorney involved in that challenge, reviewed every master list for both the grand and traverse juries from the late 1940's through 1978. Mr. Coates was attempting to find evidence of a historical pattern of discrimination that would provide circumstantial evidence in the voting rights case. J.A. 42.

In the process of sorting through thirty years of jury lists, Mr. Coates came across a page from a legal pad upon which figures, initials and a few words were written in longhand. J.A. 2-4, 44. It was not captioned or otherwise designated, dated or signed. It did not bear the file stamp of the clerk's office. Mr. Coates asked the clerk of the court, in whose office he was working, if he was familiar with the note. J.A. 45. The clerk responded that "it had come from the District Attorney's Office and that it was instructions to the Jury Commissioners in Putnam

County about what to do concerning the Master Grand and Traverse Jury Lists." J.A. 45.

The District Attorney's instructions were introduced in evidence in the *Bailey* case on August 15-17, 1978, before the United States District Court for the Middle District of Georgia. R.W. Dennis, the clerk of the Putnam County Superior Court, testified as follows regarding them:

> Q. In reconstituting the jury list, Mr. Dennis, did the jury commissioners aim at the figures suggested by the writer of this memorandum?
>
> A. Yes, they did. I turned that list over to the chairman of the jury commission.
>
> Q. With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on that grand jury list?
>
> A. Yes.
>
> Q. And that was supposed to bring the percentage up to 31.4 percent?
>
> A. Correct.
>
> Q. With regards to—
>
> THE COURT: Is this the way the present jury box is made up in your county?
>
> THE WITNESS: Yes sir.
>
> MR. COATES: Your honor—
>
> THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.
>
> MR. COATES: Your honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury commissioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

* * *

THE COURT: Well, there's no question in the Court's best judgment that the jury box as it now exists is unconstitutionally composed and cannot be further utilized for any purpose until it's completely reconstituted. . . .

Bailey v. *Vining*, Civil Action No. 76-199 MAC (M.D. Ga. 1978), Evidentiary Hearing at 118-119, J.A. 9-10; Order of August 17, 1978 at 7.[2] The Court ordered the jury commissioners, who were added as defendants in the action after the jury discrimination was discovered, to draw up new master lists. *Id.*

After the *Bailey* hearing, Mr. Coates related what he had discovered to E. R. Lambert, one of Mr. Amadeo's court-appointed attorneys, who was then working on Mr. Amadeo's appeal to the Georgia Supreme Court. J.A. 47. Mr. Lambert indicated that he had not known of any actions by the District Attorney to limit the number of blacks on the jury list. J.A. 52. Mr. Lambert told Mr. Coates that he wished he had known about it prior to trial "because we were looking for every issue to raise" on behalf of Mr. Amadeo. J.A. 47.

Mr. Lambert told Nelson Jernigan, an attorney with whom he worked in the Georgia legislature, that he would have raised the issue prior to trial if he had know about it and asked Mr. Jernigan's assistance in raising the issue before the Georgia Supreme Court. J.A. 59-60. Mr. Jernigan, who had served as a court administrator, thought that the District Attorney's action violated the requirement that only the Superior Court Judge be instructing and answering questions from the jury commissioners. J.A. 56. He testified in the District Court below:

> . . . [W]hen I saw that a person who was a lawyer who had an interest in cases that would be tried by the jurors had directly communicated . . . to the Jury Commissioners, I thought that that was an impropriety of some significance . . . . [T]here's intentional discrimination by instructing the Jury Commissioners from someone who has an interest, an advocate, who's going to appear before these jurors; in other words, he's stacking the jury.

J.A. 56.

[2] The transcript appears in the Record as Appendix B and the order as Appendix E to Petitioner's Brief in Support of Petition for a Habeas Corpus, District Court Docket No. 7.

C. Presentation of the Claim to the State Courts

The District Attorney's discriminatory scheme was raised in Mr. Amadeo's opening brief to the Georgia Supreme Court filed on December 18, 1978, and in a supplemental brief devoted exclusively to the issue. Petitioner's Exhibit 3, J.A. 12-18. The District Court's order in *Bailey* and the applicable portions of the transcript of the evidentiary hearing were appended to the supplemental brief.

In the supplemental brief, Mr. Amadeo's lawyers argued that there could not have been waiver of the jury discrimination claim because there was no opportunity to discover it:

> Here the lawyers, no matter how effective, could not have known of this insidious defect in the jury selection process until it was unearthed in the Federal proceedings. The lawyers raised the issue in the trial court by way of Notice of Appeal and Enumeration of Error, *at the earliest possible time after notice of the defect.*
>
> * * *

> Specifically, the reason that the defendant's lawyers could not have known of this defect was that an examination of the statistics on the representation of various cases would not have lead the lawyers to conclude that that a *prima facie* case on the percentage disparity could be made out. In fact this was the apparent purpose of the memo. Further, there was available to defense counsel no means to discover this unofficial directive or memo which was not a part of the public record.

J.A. 16-17 [emphasis original]. Nevertheless, the Georgia Supreme Court declined to consider the claim, holding that it "comes too late." *Amadeo* v. *State*, 243 Ga. at 629-30, 255 S.E.2d at 720, J.A. 68.

Mr. Amadeo again sought to present his claim to the state courts of Georgia in a petition for a writ of habeas corpus filed in the Superior Court of Putnam County. However, the Court refused to consider the claim:

> This issue was raised by defendant on his post conviction appeal to the Supreme Court of Georgia and this matter was decided adversely to defendant. *Amadeo* v. *The State*, 243 Ga. 627, 629.

Order of Superior Court of Putnam County, Feb. 29, 1980, at 1 (Respondent's Exhibit 3). The Georgia Supreme Court denied a certificate of probable cause to appeal from the Putnam County order. Respondent's Exhibit 4. Having exhausted state remedies, Mr. Amadeo sought relief in the District Court below.

D. Findings and Decision of the District Court

Mr. Amadeo's federal habeas corpus petition was heard by the same United States District Judge who had decided *Bailey*. As in state court, Mr. Amadeo asserted the facts as established in *Bailey* as a basis for relief and again filed copies of the District Attorney's directive to

the jury commissioners, the applicable portions of the *Bailey* transcript and the District Court's order in *Bailey* in support of his claim. D. Ct. Docket No. 7, Appendixes B, C and E. The District Court observed that under the facts developed in *Bailey*, "[c]learly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries." J.A. 78. The Court noted that it had been determined in *Bailey* that the jury selection procedures in Putnam County "were intentionally designed to underrepresent black citizens in an unconstitutional manner" in that "the Putnam County Jury Commissioners intentionally selected a specific number of individually designated blacks so as to achieve underrepresentation of approximately 11 percent—not enough to make out a prima facie case but underrepresentation nonetheless." J.A. 77, 78.

The Court then considered the State's argument "that this claim has been waived under a valid state procedural rule and cannot be asserted here absent a showing of 'cause and prejudice' for the failure to assert this issue at trial. *Francis* v. *Henderson*, 425 U.S. 536, 542 . . . ." J.A. 79. Observing that "the cause and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as "sandbagging'"—the Court found that Amadeo's lawyers could not have raised the issue prior to indictment and trial.

> It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted the claim on direct appeal to the Georgia Supreme Court, years before a federal action was first filed.

J.A. 79. The Court concluded that these circumstances constituted cause:

> This court continues to be appalled by the manner in which the Putnam County jury commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation . . . on the basis of a rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court . . . to grant the writ on the basis of an unconstitutionally composed grand and petit jury.

J.A. 80.

On appeal, the United States Court of Appeals for the Eleventh Circuit concluded that the prejudice prong of the cause and prejudice test was satisfied, *Amadeo* v. *Kemp*, 773 F.2d at 1145 n.6, J.A. 89 n.6, but remanded the case for further factual development regarding the "specifics of the alleged unconstitutional method of selecting the jurors" to determine "whether this method was so devious and hidden as to be non-discoverable" and whether the failure to challenge "was not a deliberate bypass." 773 F.2d at 1145, J.A. 88, 89.

On remand, the District Court conducted an evidentiary hearing, took testimony, and admitted as exhibits pertinent parts of the *Bailey* record as well as other documents. The District Court observed that there was no dispute as to the illegality of the District Attorney's action: "[W]e all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed." J.A. 92. The State agreed. The Assistant Attorney General stated to the District Court: "The prejudice has pretty much been conceded by the State throughout the proceedings because of the intentional discrimination and uncontroverted evidence that was produced in *Bailey* v. *Vining* . . . ." Record Vol. 2 (Docket No. 17) at 67.

The Court found that the discriminatory scheme was concealed by the prosecutor's office. J.A. 91-92. As a result, Mr. Amadeo's lawyers did not know of it until after it came to light in *Bailey*. The Court found, in these circumstances, that it was reasonable for Mr. Amadeo's counsel not to have challenged the list. J.A. 92. The Court further found that if the lawyers had known of the District Attorney's memorandum to the jury commissioners, they would have challenged it. *Id.*

Relying on these factual findings, the District Court ruled that there was "more than adequate cause" to excuse the failure to challenge the grand jury list prior to indictment and the traverse jury list prior to trial. J.A. 93. The Court also found that there was not "a deliberate bypass in any sense" in the failure to bring the challenge before the discrimination was discovered. J.A. 93.

E. Decision of the Court of Appeals

A majority of the Court of Appeals disagreed with the finding of the District Court:

> The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey* v. *Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.
>
> We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel

> elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical judgment not to mount a jury challenge because they wanted to preserve an advantageous jury venire.

816 F.2d at 1507, J.A. 103 [footnote omitted].

The dissent found that the majority's decision "ignores the policies underlying *Wainwright* v. *Sykes*, and ignores the factfinding of the district court." 816 F.2d at 1510, J.A. 109.

> At the time of trial, counsel [for Mr. Amadeo] had no reasonable basis for challenging the master jury lists. Since the [District Attorney's] memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal habeas "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

816 F.2d at 1510, J.A. 111.

The dissent also found "there is simply no factual support in the record" for the majority's finding that the District Attorney's directive was "readily discoverable" or that Mr. Amadeo's counsel "would have found the memorandum" if they had looked for it. 816 F.2d at 1512, J.A. 114. Instead, "[t]he fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county." 816 F.2d at 1513, J.A. 116.

> In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review.

816 F.2d at 1513, J.A. 117-118.

SUMMARY OF ARGUMENT

Mr. Amadeo is entitled to federal review of his claim that the District Attorney and jury commission in Putnam County unlawfully discriminated on the basis of race and gender in the jury selection process which led to his conviction and death sentence. Mr. Amadeo was unable to challenge this discrimination before indictment and trial as required by Georgia law because the District Attorney concealed the factual basis of the claim for the very purpose of avoiding judicial review.

Because this failure to comply with the state's procedural requirements is attributable to the State and not Mr. Amadeo, there is "cause" for his failure to comply with the State's procedural requirements. The District Attorney's covert corruption of the jury selection process constitutes an "external factor" and "interference by officials" which made the claim "reasonably [un]available" and "impeded" defense counsel's ability to assert the claim. *Murray* v. *Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397, 408 (1986). Therefore, federal review of the claim is not barred by this Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

There was no reasonable basis upon which Mr. Amadeo could challenge the jury selection process. *Reed* v. *Ross*, 468 U.S. 1, 17 (1984); *Engle* v. *Isaac*, 456 U.S. 107, 133 (1982). It was not known or even reasonably knowable, prior to Mr. Amadeo's trial, that the District Attorney, who had no official responsibility with regard to the jury

commission, had participated in a revision of the master jury lists by contriving a plan to perpetuate discrimination based upon gender and race. Mr. Amadeo and his counsel had no basis to suspect that the District Attorney was not abiding by his oath of office, the ethical standards which govern prosecutors, Georgia law, and federal law which prohibits exclusion of persons from juries on the basis of race. 18 U.S.C. § 243 (1982).

In addition, the District Attorney interfered with and impeded defense counsel's ability to make a challenge by engaging in deception. *Murray* v. *Carrier*, 106 S. Ct. at 2646, 91 L.Ed.2d at 408. The District Attorney designed his plan to avoid detection and insulate the discrimination from constitutional challenge. The jury lists were revised in such a way as to make it appear that discrimination had been eliminated while continuing to perpetuate it.

The District Court found that there was cause for the procedural default after making findings of fact that were based upon testimony and documentary evidence. The District Court found that the District Attorney's involvement in the jury selection was concealed and that Mr. Amadeo's lawyers would have challenged it if they had known of it. The Court of Appeals rejected these findings and substituted its own finding that the scheme was "readily discoverable" and that the lawyers did not discover it because they were not interested in mounting a jury challenge. *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103.

The findings of the District Court are not clearly erroneous. Indeed, they are fully supported by the record. Therefore, the Court of Appeals erred in setting these findings aside. *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623

(1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-289 (1982); Federal Rule of Civil Procedure 52(a). Because the decision of the Court of Appeals rests on the substitution of its findings for those of the District Court on matters of historical fact, its decision must be reversed.

Barring Mr. Amadeo from vindication of important constitutional rights in these circumstances would serve no legitimate interest, but would reward the prosecution for its unlawful actions. It was the prosecution, not the defense, that withheld the factual basis of the claim in order to gain a tactical advantage. In doing so, the prosecution corrupted the jury selection process and prevented the "full airing" of the issue before trial as required by Georgia law. *Wainwright* v. *Sykes*, 433 U.S. at 88-90. Imposition of a procedural bar would not further "good-faith attempts to honor constitutional rights," *Engle* v. *Isaac*, 456 U.S. at 128, or protect the integrity of state procedures, *Reed* v. *Ross*, 468 U.S. at 10, but would run counter to all of the interests recognized in *Sykes*. Therefore, the decision of the Court of Appeals should be reversed.

ARGUMENT

PETITIONER AMADEO IS NOT BARRED FROM VINDICATION OF HIS CONSTITUTIONAL RIGHTS WHERE THE FACTUAL BASIS FOR HIS CLAIM WAS CONCEALED BY THE PROSECUTION FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW.

This case is yet another reminder that "114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life in the administration of justice." *Vasquez* v. *Hillery*, 474

U.S. 254, 264 (1986), *quoting Rose* v. *Mitchell*, 443 U.S. 545, 558 (1979).

Discrimination was clearly a factor in the process which led to the selection of Tony Amadeo's jury in 1977. The office which prosecuted Mr. Amadeo secretly directed the jury commission to underrepresent black people and women on the master jury lists. To avoid detection and a successful challenge, the prosecution instructed the commission to fix the percentage of blacks on the grand and petit jury lists and women on the petit jury list at just below the level that would establish a *prima facie* case of discrimination solely on the basis of statistical evidence.

The District Attorney succeeded in undermining the integrity of both the jury selection system and the adversary process. The jury commissioners followed this directive and Mr. Amadeo's lawyers, unaware of the District Attorney's actions, did not challenge the composition of the grand and petit juries before indictment and trial, as required by Georgia law.[3] The question presented here is whether, despite this deception, the State may invoke principles designed to protect its good faith reliance on its procedural rules to bar federal review of its discrimination.

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[3] Georgia law requires that an objection to the grand jury composition be raised prior to indictment, *Sanders* v. *State*, 235 Ga. 425, 219 S.E.2d 768 (1975); *Wooten* v. *State*, 224 Ga. 106, 109, 160 S.E.2d 403, 406 (1968), and a challenge to the traverse jury before trial. *See Spencer* v. *Kemp*, 781 F.2d 1458, 1463-1464 (11th Cir. 1986) (en banc); O.C.G.A. § 15-12-162 (1985). The Georgia Supreme Court found that because Mr. Amadeo's counsel did not challenge the composition of the master jury lists before indictment and trial, the claim "[came] too late." *Amadeo* v. *State*, 243 Ga. 627, 629-30, 255 S.E.2d. 718, 720 (1979).

It is now well established that federal review of a claim may be barred if a state court rejected the claim for failure to comply with its procedural rules. *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976). When enforcement of a procedural rule by a state court serves a legitimate state interest, it may stand as an independent and adequate state ground for the decision which forecloses federal review. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 148 (1979); *Sykes*, 433 U.S. at 86-87; *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).[4]

Recognition of valid procedural bars serves "the State's interest in the integrity of its rules and proceedings" which are designed to resolve issues involving "the constitutionality of the procedures leading up to the verdict," *Reed* v. *Ross*, 468 U.S. 1, 10 (1984), through a meaningful adversarial process in which the defendant is represented by effective counsel. *Murray* v. *Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397, 413 (1986). Enforcement of procedural bars also requires that criminal defendants not withhold constitutional claims but comply with state procedures to ensure the "full airing of federal constitutional claims" by state trial courts. *Wainwright* v. *Sykes*, 433 U.S. at 88-90.

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[4] If enforcement of the rule does not serve such a state interest, it does not bar vindication of important federal rights. *Henry* v. *Mississippi*, 397 U.S. 443, 447-448 (1965). *See, e.g., Reece* v. *Georgia*, 350 U.S. 85 (1955); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Carter* v. *Texas*, 177 U.S. 442, 447 (1900). In each of these cases, this Court held that jury challenges should be considered on the merits despite a failure by the defendant in each case to comply with state procedural rules because enforcement of the rules did not serve a legitimate state interest or would violate due process.

Even where there has been a failure by a defendant to comply with the state's procedural rules, a federal court must reach the merits of a constitutional claim where a petitioner establishes cause and actual prejudice for the default. *Isaac*, 456 U.S. at 126-130; *Sykes*, 433 U.S. at 87-88. Here, prejudice has been conceded by the State, Record, Vol. 2 (Docket No. 17), at 67, and found by the Court of Appeals, *Amadeo* v. *Kemp*, 773 F.2d at 1145 n.6, J.A. 89 n.6, and, thus, is not at issue. *See Reed* v. *Ross*, 468 U.S. at 12.

Mr. Amadeo is entitled to vindication of his claim under the holdings of these cases and the equitable principles upon which they rest. The failure to raise and litigate the issue prior to trial was not attributable to his counsel, but to the District Attorney's deliberate concealment of his actions in order to prevent review in any court, state or federal. This breakdown of the adversary process is due to actions by the State, which should not benefit from its own misconduct.

Barring Mr. Amadeo from presenting his claim in federal court would serve no legitimate state interest. It would not protect the integrity of the state process, but would reward the District Attorney for undermining "the structural integrity of the criminal tribunal itself." *Vasquez* v. *Hillery*, 474 U.S. at 263-64. It would not discourage defendants from withholding claims—Mr. Amadeo sought to present his claim to the state courts immediately upon learning of it—but would reward the District Attorney for successfully withholding this claim from Mr. Amadeo and the courts.

In this brief, petitioner Amadeo will demonstrate that the District Court correctly found that there was cause which excuses the failure to present the claim more

promptly to the state courts, that the Court of Appeals erred in rejecting findings of fact by the District Court which were not clearly erroneous, and, finally, that none of the state and federal interests involved here would be served by rewarding the State for its concealment of its discrimination.

A. THE PROSECUTION'S DELIBERATE CONCEALMENT OF ITS DISCRIMINATION CONSTITUTED CAUSE FOR MR. AMADEO'S FAILURE TO CHALLENGE THE JURY PRIOR TO TRIAL.

While reluctant to articulate a "precise definition of the 'cause-and-prejudice' standard," *Wainwright* v. *Sykes*, 433 U.S. at 87, this Court has held in *Carrier* that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the state's procedural rule." *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408.

In *Carrier*, this Court identified two showings which would constitute cause: where an external factor made the claim "reasonably [un]available" or impeded defense counsel's ability to assert the claim, and where "interference by officials . . . made compliance impracticable[.]" *Id. See also Reed* v. *Ross*, 468 U.S. at 14 ("[T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement [of cause] is met."); *Worthan* v. *Wyrick*, 805 F.2d 303, 306-07 (8th Cir. 1986).

Here, the District Court correctly found that the covert activities of the prosecutor's office rendered the jury discrimination claim reasonably unavailable and impaired counsel's ability to protect his client's right to be indicted,

tried and ultimately sentenced by juries unaffected by racial discrimination.

1. Until the Inadvertent Discovery of the Prosecutor's Memorandum, the Deliberate Discrimination in the Selection of the Jurors Could Not Have Been Challenged.

The District Court found that no challenge was made to the prosecutor's discrimination in the jury selection process because Mr. Amadeo and his attorneys did not know of the plan at the time of his trial. A determination of whether this lack of knowledge on the part of counsel constituted cause turns upon whether there was a "reasonable basis" upon which to challenge the jury selection process. *Reed* v. *Ross*, 468 U.S. at 17; *see also Engle* v. *Isaac*, 456 U.S. at 133. Here, there was none.

There was absolutely no reason for Mr. Amadeo or his counsel to suspect that his adversary, the District Attorney, would be engaged in a covert illegal scheme to exclude groups he viewed as undesirable from the master jury list. Indeed, the very notion that the District Attorney would undertake to communicate *ex parte* with the jury commissioners and the court clerk, and to dictate to them how jurors should be chosen—let alone that the instructions would be followed—would be inconceivable if it had not actually happened in this case. Moreover, the scheme was designed by the District Attorney to avoid detection and challenge.

Under the Georgia statutes that govern jury commissioners and the drawing of juries, and the standards that govern prosecutorial conduct, there was no reasonable basis for Mr. Amadeo to suspect such foul play. Under Georgia law, only the members of the jury commission,

who are vested with independence and autonomy,[5] are authorized to revise the jury lists and determine who meets the qualifications for jury service. O.C.G.A. §§ 15-12-40(a), 15-12-41 (1985). Practicing attorneys and county officers are expressly barred from service on jury commissions. O.C.G.A. §§ 15-12-20(a), 15-12-21. All proceedings are privileged and must be conducted in secret.[6] Contact with outside entities or individuals is envisioned in only two circumstances,[7] neither of which involves the District Attorney.

The commission is required to draw up the master lists by selecting from the list of registered voters "a fairly representative cross-section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40(a)(1). If the list is not fairly representative, the commission, without external input, is to supplement the list by "personally acquainting themselves with other citizens in the county," including those of any "significantly identifiable group . . . which may not be fairly represented on the list." *Id.*

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[5] *See, e.g.*, O.C.G.A. § 15-12-22 (1985); *Clark* v. *State*, 255 Ga. 370, 373-74, 338 S.E.2d 269, 273 (1986) (legitimacy of jury commissioners would be undercut by the appearance of partiality that would arise if deputy sheriffs were permitted to serve as commissioners); *Blevins* v. *State*, 220 Ga. 720, 141 S.E.2d 426 (1965).

[6] O.C.G.A. §§ 15-12-22, 15-12-23(a) (1985). Commissioners take an oath not to disclose commission matters or proceedings absent court order. O.C.G.A. § 15-12-22. Only the master jury lists are a matter of public record, and even then, only after the list has been properly certified. O.C.G.A. § 15-12-43.

[7] The county clerk of court is appointed by statute to the commission. O.C.G.A. § 15-12-23(a) (1985). Commissions are also authorized to interact with superior court judges. The chief judge appoints and removes members of the commission. O.C.G.A. § 15-12-20. The court also determines how frequently jury lists must be revised. O.C.G.A. § 15-12-40(a).

Based solely on that direct determination by the commissioners themselves, the commission is required to determine who is eligible and qualified for inclusion. O.C.G.A. § 15-12-40.

Based on its statutory structure and purpose, it is clear that a county jury commission is not to be dependent upon the District Attorney's office for advice, much less be guided by its specific direction. Given its character and functioning, a jury commission ought not have contact with the prosecutor's office even if that contact were conducted in good faith. Where, as here, far from good faith, the contact is premised on the unlawful and untenable purpose of perpetuating race and gender discrimination, contact between jury commissioners and the prosecutor's office is not foreseeable.

Such foreseeability is further diminished by the legal and ethical standards governing the prosecutorial function. The statute setting out the duties of the District Attorney, O.C.G.A. § 15-18-6 (1985), contains no provision for interaction with the jury commission. Even if it did, the District Attorney would not be authorized to give the sort of advice rendered here. The District Attorney's responsibility is to uphold the law.[8] Congress has made the exclusion of persons from a grand or petit jury on the basis of race a crime. 18 U.S.C. § 243 (1982). Here, the District Attorney told the commissioners not only how to commit a crime, but how to get away with it.

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[8] "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice . . . ." Ethical Consideration 7-13, Rules and Regulations for the Organization and Government of the State Bar of Georgia; *Hall* v. *State*, 180 Ga. App. 881, 885, 305 S.E.2d 801, 805 (1986), *quoting*, *Burns* v. *State*, 172 Ga. App. 645, 324 S.E.2d 197 (1984) (incorporating E.C. 7-13 as legal standard gauging prosecutorial misconduct); *see also Berger* v. *United States*, 295 U.S. 78, 83 (1935).

Thus, counsel cannot be expected to have anticipated that the District Attorney was instructing jury commissioners to discriminate in the compilation of master jury lists. Absent any information to the contrary, it was not unreasonable for them to assume that the District Attorney was upholding the law, rather than subverting it.

Similar circumstances were held to constitute cause in *Thompson* v. *White*, 661 F.2d 103, 105 (8th Cir. 1981), *vacated and remanded*, 456 U.S. 491 (1982), *adhered to on remand*, 680 F.2d 1173 (1982), *cert. denied*, 459 U.S. 1177 (1983). There the defendant discovered after trial that the sheriff had personally selected potential jurors from among people he knew instead of following the random jury selection procedure required by statute. The court held that because Thompson "did not know or have reason to suspect that the statutory procedure was not being followed, he certainly had 'cause' not to object." 680 F.2d at 1174, quoting 661 F.2d at 105-106.

Because knowledge of the prosecutor's dealings with the commission and his plan to limit the participation of black people and women cannot be imputed to defense counsel, the factual basis for the claim was not reasonably available. *Murray* v. *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408; *Reed* v. *Ross*, 468 U.S. at 14-15. Accordingly, there is cause for the failure to raise the claim preindictment and pretrial as required by Georgia law.

2. The District Attorney's Scheme Constituted an External Factor and Interference by Governmental Officials Which Prevented Mr. Amadeo's Counsel From Complying With the State's Procedural Requirement.

Not only was there no reasonable basis for Mr. Amadeo's counsel to suspect that the District Attorney

was involved in jury discrimination, but the District Attorney contrived to discriminate in such a manner as to conceal the very existence of that discrimination. His plan, implemented by the jury commissioners, gave the appearance of remedying the evil of discrimination, while actually perpetuating it and insulating it from constitutional challenge by avoiding a *prima facie* case based upon statistical inferences. This deception "interfered with" defense counsel's ability to detect and litigate the claim, thereby making compliance with the state's procedural rule not only "impractical," but impossible. *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408.

The ability of Mr. Amadeo's counsel to litigate the discrimination claim turned on having accurate and reliable information concerning how the juries were drawn. "[C]ounsel has a duty to make reasonable investigations" with respect to legal and factual matters. *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). However, counsel cannot be expected to investigate issues where there is an objective basis to believe they will not bear fruit. *Id.* at 691. This would have been a particularly unrealistic expectation in this case where counsel, representing three youths from Maine, Texas and Minnesota charged with capital murder, had just two months to prepare for a capital murder trial.[9] Consequently, in the case at bar,

[9] Counsel, moved to continue the trial from November to March because of the need to prepare on a number of fronts. J.A. 63-65. According to counsel's joint affidavit of October 27, 1977, a month before trial, counsel had yet to interview the three defendants, contact members of their families in Maine, Minnesota and Texas, contact their superior military officers at Jacksonville, North Carolina, investigate mental health issues, investigate Mr. Amadeo's interrogation by military personnel in Ft. Gordon, Georgia, and obtain the prosecution's list of witnesses. *Id.*

any decision to pursue a jury composition claim turned on the information that was reasonably available to counsel.

In these circumstances, no competent attorney, without any basis for suspecting the District Attorney's involvement in jury selection, could be expected to spend the "great deal of time" that plaintiff's counsel in *Bailey* v. *Vining* spent over the course of a summer before finding the District Attorney's note to the jury commissioners. J.A. 42. Even if counsel had pursued a challenge, the scope of his inquiry would have been far narrower than that of counsel in *Bailey*, who reviewed documents covering jury practices over thirty years.

At the time of Mr. Amadeo's indictment and trial, the only information available to counsel was misleading and the product of a deliberate deception by the District Attorney. Racial discrimination did not appear to affect the drawing and selection of juries in Putnam County because, as established by the evidence, and found by the District Court, underrepresentation was maintained just at the point where it would not constitute a *prima facie* case under *Swain* v. *Alabama*, 380 U.S. 202 (1965).

In a rural county, such as Putnam, such underrepresentation served two purposes. The race and gender disparities and operative discrimination was not readily apparent to trial lawyers who saw jury venires brought into court from one term to the next. Hence, there would appear to be no reason for further investigation. But even if further investigation were undertaken, the jury list had been altered in such a way that the requisite *prima facie* showing could not be made.

The scheme, therefore, accomplished the precise goal for which it was intended: as a result of official action, Putnam County juries would continue to function in an

unrepresentative manner, yet the likelihood of the process being again subjected to judicial and constitutional scrutiny was all but eliminated. The incentives to investigate and litigate jury claims, as well as the inferential proof generally marking such claims, were absent.

Thus, the District Attorney's deception made compliance with the state's procedural rules impossible. Where the prosecution misleads the defense concerning the nature of potential claims, the state is estopped from asserting that such claims are waived by defense reliance on the misrepresentation and consequent failure to pursue the claims in a timely fashion. *Freeman* v. *Georgia*, 599 F.2d 65, 72 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). Therefore, there is cause for the failure to litigate the issue before the evidence was discovered.

B. THE COURT OF APPEALS' DECISION THAT THERE WAS NO CAUSE RESTS UPON ITS ERRONEOUS REJECTION OF FINDINGS OF FACT BY THE DISTRICT COURT THAT ARE NOT CLEARLY ERRONEOUS.

The holding of the Court of Appeals that there is no cause for petitioner's procedural default rests upon the court's rejection of the factfindings of the District Court which are not clearly erroneous. The Court of Appeals rejected the District Court's findings that the discriminatory scheme was concealed and substituted its own finding that it was "readily discoverable." 816 F.2d at 1507, J.A. 103. The Court of Appeals also rejected the District Court's findings that Mr. Amadeo's lawyers would have raised the challenge had they known of the District Attorney's note, and, observing that there was a "direct conflict" in the testimony on the point, substituted its finding that the lawyers did not find the memorandum

because they were not interested in a jury challenge. 816 F.2d 1507, 1507 n.9, J.A. 103 n.9.

Having substituted these findings for those of the District Court on these two questions of historical fact, the Court of Appeals then concluded: "These facts, in our opinion, do not establish sufficient 'cause' to excuse Amadeo's procedural default." *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103. Because the Court of Appeals failed to take into account Federal Rule of Civil Procedure 52(a), its decision must be reversed.

Rule 52(a) requires that findings of fact by a district court are not to be set aside on appeal unless clearly erroneous. *Anderson* v. *Bessemer City* 470 U.S. 564 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-289 (1982).[10]

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have determined the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

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[10] The clearly erroneous standard applies to the Court of Appeals' review of the District Court's findings of fact in a habeas corpus action. *Wade* v. *Mayo*, 334 U.S. 672, 683-684 (1948); *Adams* v. *Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986).

Anderson v. *Bessemer City*, 470 U.S. at 573-574 [citations omitted]. The clearly-erroneous rule applies even when findings are based "on physical or documentary evidence or inferences from other facts." 470 U.S. at 574. Particular deference is given to factfindings based upon determinations of credibility of witnesses who appear before the court. 470 U.S. at 575. *See also United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952).

The Court of Appeals failed to abide by the strictures of Rule 52(a) in rejecting factfindings which were based upon the credibility of witnesses who appeared before the District Court as well as documentary evidence received by the Court. The Court of Appeals rejected findings which were fully supported by the record and substituted factfindings which have little or no support in the record.

The record is replete with evidence which supports the District Court's finding of concealment. The record from *Bailey* v. *Vining*, with which the District Court was thoroughly familiar from its role as factfinder in that case, the testimony of Mr. Coates regarding how he found the note in reviewing documents covering thirty years, and the testimony of Mr. Amadeo's lawyers that they were unaware of the plan, J.A. 24, 33, 42, support the District Court's findings. However, the most compelling evidence is the District Attorney's note itself. Petitioner's Exhibit 4, J.A. 4. This series of numbers, initials, and a few words —untitled, undated, unsigned, handwritten on legal paper, and not stamped by the clerk—clearly was not intended for public inspection. Indeed, concealment is the only reasonable inference to be drawn from the very nature of the scheme; it could hardly succeed if it were known or readily discoverable.

Nevertheless, the Court of Appeals found that the prosecutor's note "was not concealed." *Amadeo* v. *Kemp*,

816 F.2d at 1507, J.A. 103. However, as observed by the dissent, "there is simply no support in the record for the proposition that the memorandum was 'readily discoverable' or that Amadeo's counsel 'would have found the memorandum' if they had looked." *Amadeo* v. *Kemp*, 816 F.2d at 1512, J.A. 114. All of the evidence supported the District Court's finding that the discriminatory plan was concealed.

Having found that the scheme was not concealed, the Court of Appeals then found that Mr. Amadeo's lawyers did not find the District Attorney's directive because they did not want to "mount a jury challenge because they wanted to preserve [an] advantageous jury venire." 816 F.2d at 1507, J.A. 103.[11] In doing so, the Court rejected the District Court's finding that the lawyers would have challenged the discrimination if they had known of the District Attorney's scheme. The Court of Appeals acknowledged that it was reaching a different conclusion about the credibility of the witnesses who appeared before the District Court than the District Court:

> In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury . . . . These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.

Amadeo v. *Kemp*, 816 F.2d at 1507 n.9, J.A. 103 n.9.

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[11] As used by the parties and the courts in this litigation, "venire" and "array" refer to the prospective jurors selected from the master jury list for the jury selection process in this particular case.

The Court of Appeals erred in substituting its judgment regarding the credibility of witnesses for that of the District Court.

> . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. *Bessemer City*, 470 U.S. at 575. Here the testimony that Mr. Amadeo's attorney's responded to discovery of the scheme with shock at the District Attorney's actions and regret that they had not known of it prior to trial is entirely plausible. It is supported by their immediately raising the issue to the Georgia Supreme Court. It is further supported by their representations to that court. J.A. 12-18. Clearly, the view of the evidence taken by the District Court was "permissible" and, therefore, it "cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U.S. at 574.

The factual conclusion drawn by the Court of Appeals that the traverse jury venire was so favorable that counsel would have ignored manipulation of the master lists by the prosecutor is contradicted by other actions taken by counsel which belie any particular affinity for the particular venire selected for Mr. Amadeo's trial. Counsel sought a change of venue, asserting that "a large portion of the jurors have formed an opinion as to Movants' guilt or have become prejudiced or biased against them." Petitioner's Exhibit 1, J.A. 61. This motion was asserted at the start and the conclusion of jury selection. Trial transcript (Respondent's Exhibit 1) at 1, A-245. Counsel also moved to continue the case until the next term of court. In a sworn affidavit in support of the motion, counsel

expressed his belief "that the passage of time will allow passions, excitement and prejudice to subside and that the Defendants will have a better chance for a fair trial if the trial is continued . . .]." Petitioner's Exhibit 2, J.A. 65.

Moreover, counsel were not aware of any "favorable [traverse] jury array," *Amadeo* v. *Kemp*, 816 F.2d at 1507 n.9, J.A. 103 n.9, at the time the grand jury challenge had to be made, prior to indictment. Thus, there was no basis to forgo challenging the grand jury.

Finally, regardless of what consideration counsel may have given to undertaking a traverse jury challenge based on statistics in the two months before trial, they did not and could not have made a decision not to challenge the grand and traverse juries based upon direct evidence of discrimination resulting from tampering by the District Attorney. The record indicates without contradiction that counsel did not know before trial that the District Attorney had instructed the jury commissioners to limit the participation of persons he deemed undesirable in the jury pools. "A defendant cannot have waived more than what he knew existed." *Freeman* v. *Georgia*, 599 F.2d at 72.

The question, however, is not which view of the facts is more convincing, but whether the facts found by the District Court are "plausible in light of the evidence viewed in its entirety[.]" *Anderson* v. *Bessemer City*, 470 U.S. at 574. Here, there was ample support in the record for the District Court's conclusion that Mr. Amadeo's counsel would have raised the discrimination claim if the prosecutor's surreptitious activities had not been concealed.

Two additional factors make it clear that the Court of Appeals misapprehended or misapplied Rule 52(a). First,

"the District Court was not faulted for misunderstanding or applying an erronecus definition" of the law by the Court of Appeals. *Pullman-Standard* v. *Swint*, 456 U.S. at 287. Here it was clear that the District Court applied the correct legal standard in making its findings of fact. J.A. 79, 93. The Court of Appeals did not take issue with the District Court's understanding of the applicable law, but instead disputed only pure questions of fact: whether the discrimination was concealed and, if it was not, why it was not found. In *Pullman-Standard*, this Court reversed for failure to abide by the strictures of Rule 52(a) after it found that the decision of the court of appeals was based on a disagreement concerning the facts, not a conclusion that the district court had erroneously applied the law. 456 U.S. at 291-293. The same resolution is required here.

Second, the Court of Appeals did not acknowledge Rule 52(a) or discuss its application to the facts found by the District Court. In *Pullman-Standard*, this Court noted that the court of appeals' acknowledgment of Rule 52(a) came "late in the court's opinion" and not "in the course of disagreeing with the District Court's resolution of the factual issues . . . ." 456 U.S. at 290. Here there was no mention of Rule 52(a) at all and the Court of Appeals expressly stated that it disagreed with the facts found by the District Court. *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103.

Thus, the Court of Appeals failed to apply the clearly-erroneous standard to the factfindings of the District Court. Its decision must be reversed because the facts as determined by the District Court clearly constitute cause under the decisions of this Court.

C. NO LEGITIMATE STATE OR FEDERAL INTEREST WOULD BE SERVED BY BARRING A CLAIM WHERE THE PROCEDURAL DEFAULT WAS THE RESULT OF DELIBERATE CONCEALMENT BY THE STATE FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW.

This Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." *Kuhlman* v. *Wilson*, 477 U.S. ___, ___, 106 S.Ct. 2616, 2623, 91 L.Ed.2d 364, 377 (1986), *quoting Fay* v. *Noia*, 372 U.S. 391, 438 (1963); *see also Murray* v. *Carrier*, 106 S.Ct. at 2650, 91 L.Ed.2d at 414. "Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Fay*, 372 U.S. at 438. The State in asserting a procedural bar against Mr. Amadeo comes before the Court not with clean hands, but in breach of a most fundamental "'constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision of 1881 of *Neal* v. *Delaware* [103 U.S. 370 (1881)]—not to pursue a course of conduct . . . which would operate to discriminate against the selection of jurors on racial grounds'" *Peters* v. *Kiff*, 407 U.S. 493, 506 (1972) (opinion of Justice White), *quoting Hill* v. *Texas*, 316 U.S. 400, 404 (1942).

A holding that Mr. Amadeo is barred from federal review under the facts of this case would not serve any of the equitable principles which govern habeas corpus or the interests recognized by this Court in *Wainwright* v. *Sykes* and its progeny. Instead, it would allow the State to insulate its invidious discrimination from review by engaging in the most devious and underhanded tactics.

The "cause and prejudice" standard rests upon "consideration of comity and concerns for the orderly administra-

tion of justice . . . ." *Francis* v. *Henderson*, 425 U.S. at 538-539. Its adoption was based, in part, upon this Court's recognition that state criminal trial courts "hold initial responsibility for vindicating constitutional rights" and that federal intrusions into state trials may frustrate "good-faith attempts to honor constitutional rights" by those courts. *Isaac*, 456 U.S. at 128. *See Sykes*, 433 U.S. at 88-90. It strikes a balance between the federal interest in vindicating the constitutional rights of state prisoners, *Francis* v. *Henderson*, 425 U.S. at 541, and "the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed* v. *Ross*, 468 U.S. at 10. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*," 38 U. Chi. L. Rev. 142 (1970).

The cause and prejudice standard is intended to emphasize the "trial of a criminal case in state court as a decisive and portentous event" at which "all issues which bear on the charge should be determined . . . ." *Sykes*, 433 U.S. at 90. It requires defendants to make timely assertions of the safeguards available to them before the state courts so that issues can be fully developed and decided while the recollections of witnesses are the freshest. *Isaac*, 456 U.S. at 128, *Sykes*, 433 U.S. at 88. Requiring such compliance with the state's procedural rules "channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed* v. *Ross*, 468 U.S. at 10.

The cause and prejudice standard, therefore, depends on the proper functioning of the adversary system, which, in turn, relies upon two independent components. On the one hand, it requires discharge of the defense function. *See Carrier*, 106 S.Ct. at 2650, 91 L.Ed.2d at 413. Criminal proceedings are a "reliable adversarial testing process," only where an accused is represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984); *see also United States* v. *Cronic*, 466 U.S. 648, 656-657 (1984). If the adversary process is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial so that they may be relied upon in subsequent proceedings. *Sykes*, 433 U.S. at 89.

The adversary process is also impaired by the perversion of its other component, the prosecutorial function. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Miller* v. *Pate*, 386 U.S. 1 (1967); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Such a perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by misleading or deceptive conduct that is specifically intended to accomplish illegal ends. *Franks* v. *Delaware*, 438 U.S. 154 (1978) (fourth amendment violated where state relies upon material misstatements in warrant proceeding); *Oregon* v. *Kennedy*, 456 U.S. 667 (1982) (fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); *Napue* v. *Illinois* (due process violated by prosecutor's failure to correct misleading trial testimony).

None of the interests served by the cause and prejudice standard, or ultimately the adversarial system, would be furthered by enforcement of a procedural bar against Mr. Amadeo. To be sure, the "sanctity" and "prominence" of his trial were undermined, *Isaac* 456 U.S. at 127, but not because Mr. Amadeo's counsel failed to make a timely challenge to the processes that led to the selection of grand and petit jurors. To be sure, his trial was also marred by sandbagging, but it was not the defendant who

sought to manipulate procedure to gain a tactical advantage.

In this case it is the prosecutor, not the defendant, who has undercut the integrity of judicial process and who is responsible for the failure to litigate paramount constitutional questions in accord with state procedural law. It is the prosecutor who jeopardized adversarial process when he distorted and withheld the factual basis for the claim and deliberately bypassed lawful procedure to gain an untenable end.

Here the prosecutor corrupted the trial process in a particularly pernicious way. The District Attorney was not merely a passive participant to a proceeding in which constitutional obligations were not honored. *Giglio*, 405 U.S. at 154 (failure to disclose exculpatory material unconstitutional even though prosecutor unaware of the existence of the impeachment material). Instead, he singularly spearheaded the commission of unconstitutional and criminal acts, and did so in a way that involved their deliberate concealment. *Compare Miller; Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) ("rudimentary demands of justice" violated where prosecutor not only relies on false testimony, but is aware it is false and deliberately attempts to conceal its falsity).

Reliance on a doctrine designed to bolster the significance of trials and promote adversarial process to bar federal review of the prosecutor's actions would be particularly inappropriate here because the prosecutor violated the most "valued right" of all. *United States* v. *Jorn*, 400 U.S. 470, 484 (1970). "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391

U.S. 145, 155 (1968). "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." *Peters* v. *Kiff*, 407 U.S. at 502. Discrimination that affects juries, therefore, "strikes at the fundamental values of our judicial system and our society as a whole," *Rose* v. *Mitchell* 443 U.S. 545, 556 (1979), and is "at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946).

Because claims of racial discrimination in jury selection "brings the integrity of the judicial system into direct question" a "federal forum must be available if a full and fair hearing of such claims is to be had." *Rose* v. *Mitchell*, 443 U.S. at 562, 563. It is particularly important that a federal forum be available in this case where the District Attorney not only brought about this discrimination, but did it in a way that was designed to avoid detection and adversary testing.

The equitable character of habeas corpus relief requires that cause for apparent procedural defaults be recognized where, as here, an issue is not timely litigated due to government deception and covert interference with the exercise of constitutional rights. The "cause and prejudice" standard is intended to protect a state's *"good-faith* attempts to honor constitutional rights." *Isaac*, 456 U.S. at 128 [emphasis added]. As noted by the dissent below, it would be ironic indeed if a doctrine rooted in equity and comity were turned on its head and used to shield the deliberate subversion of pivotal constitutional principles.

Instead, as called for by the dissent, "[w]here the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." 816 F.2d at 1513.

Thus, the equitable principles which govern habeas corpus and which informed this Court's decision to adopt the cause and prejudice standard in *Sykes* all militate strongly against the State's assertion of procedural default. The fairness and integrity of process will best be served by the vindication of the important federal rights denied Mr. Amadeo. Accordingly, this Court should hold that there was cause for the failure to challenge the jury discrimination before trial.

CONCLUSION

For the foregoing reasons, Tony B. Amadeo respectfully prays that this Court reverse the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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NO. 87-5277

In The
Supreme Court of the United States
October Term, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a reasoned, deliberate, tactical decision made by competent trial counsel to forego a procedural opportunity can serve as "cause" to excuse a procedural default under the standards of *Wainwright v. Sykes*, 433 U.S. 72 (1977)?

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TONY B. AMADEO,

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RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

CITATIONS TO OPINIONS BELOW

The initial decision of the Eleventh Circuit vacating the district court's order which granted federal habeas corpus relief to Petitioner is contained in *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985). (Joint Appendix, p. 82). The final decision of the Eleventh Circuit reversing the granting of federal habeas corpus relief to Petitioner is reported in *Amadeo v. Kemp*, 816 F.2d 1502 (11th Cir. 1987). (Joint Appendix, p. 94).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on April 30, 1987. Petitioner's petition for rehearing was denied on June 8, 1987. The petition for writ of certiorari was docketed in this Court on August 10, 1987, and the writ of certiorari was granted on October 19, 1987, (J.A., p. 121). Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 15-12-162; former Ga. Code Ann. § 59-803:

> The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled or ought not to be put upon him. The court shall determine the sufficiency of the challenge at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed.

———o———

STATEMENT OF THE CASE

Petitioner, Tony B. Amadeo, was convicted in the Superior Court of Putnam County, Georgia for the offenses of murder and for criminal attempt to commit theft. Petitioner received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. Petitioner's motion for a new trial was overruled by the Superior Court of Putnam County, Georgia on September 18, 1978.

On direct appeal, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences in *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979). Following the submission of briefs on Petitioner's direct appeal, Petitioner obtained new counsel, who raised additional issues for the consideration of the Supreme Court of Georgia. A motion for rehearing was filed on behalf of the Petitioner raising these additional issues including raising for the first time challenges to the arrays of the grand and traverse juries in Putnam County. The Supreme Court of

Georgia considered, but rejected, these issues raised in the motion for rehearing, stating its reasons for denying the motion in a separate opinion dated May 29, 1979.

A petition for a writ of certiorari which was filed in this Court was denied on November 26, 1979. A petition for rehearing was denied by this Court on January 21, 1980.

Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia. The Superior Court of Putnam County denied Petitioner state habeas corpus relief on February 29, 1980 and did not reach the merits of the claims raising challenges to the grand and traverse juries. Next, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. This application was denied on September 10, 1980, with a motion for rehearing being denied on September 24, 1980. A petition for a writ of certiorari was denied by this Court on March 30, 1981, with a petition for rehearing being denied on May 18, 1981.

Petitioner then filed an application for federal habeas corpus relief in the district court, Civil Action No. 81-122-MAC, raising all of the grounds contained in his application for state habeas corpus relief, except for raising for the first time the contention that Petitioner received ineffective assistance of counsel because of the failure of his trial attorneys to raise a challenge to the composition of the grand and traverse juries prior to Petitioner's trial. On September 22, 1982, the district court dismissed this application for federal habeas corpus relief without

prejudice, based on Petitioner's failure to exhaust his contentions concerning ineffective assistance of counsel.

On October 25, 1982, Petitioner filed a second state habeas corpus petition in the Superior Court of Butts County, Georgia, raising his contention of ineffective assistance of counsel with regard to trial counsels' failure to challenge the composition of the grand and petit juries. Respondent filed an answer and also filed a motion to dismiss the petition, asserting that the claim had been waived pursuant to O.C.G.A. § 9-14-51 and that this petition should be dismissed as successive. A hearing was conducted in the Superior Court of Butts County on March 14, 1983. Following a hearing, Respondent's motion to dismiss was granted by the Superior Court of Butts County on March 16, 1983. Petitioner filed an application for a certificate of probable cause to appeal. On June 21, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and Petitioner's motion for reconsideration was denied by that court on July 7, 1983.

Next, Petitioner filed a petition for a writ of certiorari in this Court on September 3, 1983 and Respondent filed a brief in opposition on October 4, 1983. On October 31, 1983, this Court denied the petition for a writ of certiorari and Petitioner's petition for rehearing was denied on January 9, 1984.

Petitioner then filed a second application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia on January 25, 1984.

On April 27, 1984, Petitioner filed a motion for partial summary judgment. On May 17, 1984 the United States District Court entered an order granting federal habeas corpus relief, vacating Petitioner's convictions and sentences and directing that Petitioner be reindicted and retried. Judgment was entered in favor of the Petitioner on May 18, 1984. On June 15, 1984, Respondent filed a timely notice of appeal to the Eleventh Circuit.

The Eleventh Circuit remanded the case to the district court on September 27, 1985 for an evidentiary hearing on the issue of "cause" and "prejudice" alleged to be present for excusing Petitioner's procedural default with reference to his untimely jury challenges to the arrays of the grand and traverse juries. *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985). (J.A., p. 82). Following the conducting of an evidentiary hearing in the district court, the district court again granted federal habeas corpus relief, finding cause and prejudice to excuse Petitioner's procedural default. The Eleventh Circuit reversed the granting of federal habeas corpus relief finding Petitioner to have committed a procedural default. *Amadeo v. Kemp*, 816 F.2d 1502 (11th Cir. 1987). (J.A., p. 94). It is this order that Petitioner sought to have reviewed by this Court by means of his petition for a writ of certiorari. On October 19, 1987, this Court granted the writ. (J.A., p. 121). This brief is filed in response to Petitioner's brief filed on the merits following the granting of certiorari.

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STATEMENT OF THE FACTS

At approximately 8:30 a.m. on September 29, 1977, Talmadge Holder was driving his truck near the intersection of Hillsboro Road and Monticello Highway between Monticello and Eatonton, Georgia. While driving along this road, Holder saw his friend, Mr. James D. Turk, Sr., standing beside his truck, picking up a sack from the ground to throw it into a nearby dumpster. (T. 96).

Mr. Holder waved at Mr. Turk and pulled up to the intersection of Hillsboro Road and Monticello Highway. As Holder reached the intersection, he heard Mr. Turk yelling. When Mr. Holder rolled down the window, he could hear Mr. Turk shouting, "Help, I'm shot, somebody help me."

Mr. Holder noticed a white car sitting on the other side of Mr. Turk's truck. A short man was standing on the driver's side of Mr. Turk's truck. After hearing Mr. Turk cry out, Mr. Holder saw this person get in the nearby car and observed the car pulling off. (T. 98).

Mr. Holder identified the Petitioner as the man he saw standing by Mr. Turk's truck. Mr. Holder also noticed that there were two people inside the white car. (T. 110).

Mr. Rudy Mangham was also en route from Monticello to Eatonton on the morning of September 29, 1977. As he passed the intersection of Hillsboro Road and Monticello Road, he noticed a pickup truck parked beside the highway. (T. 114-115). The truck was parked near a dumpster and he noticed someone beside the truck, in between the truck and the dumpster. A white mid-sized

Chevrolet, with three men inside, two in the front seat, and one in the back seat, pulled out in front of him. (T. 115-116).

Eugene Resseau, Sheriff of Putnam County, was informed that there had been a shooting on Highway 16. The investigation revealed that the victim, Mr. Turk, was lying on his side next to his truck with bloodstains appearing on the side of his shirt. (T. 111-112). A .22 short bullet and expended casing were recovered from the bed of the victim's truck. (T. 119). Mr. Jim Covington of the Georgia Bureau of Investigation processed the crime scene, took photographs and recovered evidence. Agent Covington also aided in conducting interviews and received a description of the suspected vehicle in which the perpetrators of the crime were riding. A lookout was placed for a white Chevrolet Monte Carlo with an out-of-state tag, having a light background and dark numerals and letters. (T. 120).

A radio call was received from a Georgia Bureau of Investigation (GBI) agent in Thomson, Georgia, stating that this vehicle had been impounded because two white males in this car had been arrested for taking gas without paying for it. (T. 121). A .22 caliber pistol was recovered from the floorboard of the passenger side of this car. (T. 121-122). A check of the ownership of the Monte Carlo revealed that it was registered to the Petitioner, Tony B. Amadeo. (T. 113).

When the car was stopped initially, David Coulter and William Conologue were occupying the car, but the Petitioner was not taken into custody at this time. (T. 122). Later, upon discovering that the car seized in connection with this crime was registered to Mr. Amadeo,

Petitioner was taken into custody and returned to McDuffie County. (T. 226).

Petitioner, Coulter and Conologue were interviewed at the McDuffie County jail. Agent Covington took a statement from Conologue and Coulter, while Agent Haizlip and Agent Lawrence took a statement from Petitioner. The notes taken of these various interviews were compared by the GBI agents, and there were found to be major inconsistencies in the statements of Petitioner and the other two men. (T. 123). Agent Covington then talked to the Petitioner and told him there were inconsistencies in the statements. (T. 124). Agent Haizlip then returned and Petitioner made a second statement which the agent transcribed. (T. 125).

In Petitioner's second statement, he admitted that he and his two companions had been driving around Georgia looking for a small store to rob. While they were driving around, they spotted a white man in a brown pickup truck dumping trash in a dumpster. First, they passed it and then turned around and came back. Petitioner stated to Agent Haizlip that he got out of the back seat with his .22 automatic, walked up to the truck and demanded money from the man. Petitioner stated that he then shot the man and that the man grabbed his chest and slid off the right side of the truck to the ground, yelling for help. The Petitioner stated he ran for the car and they took off. Finally, the three men got on I-20 to return to North Carolina. (T. 225).

The medical examiner testifed that the cause of death to the victim, Mr. Turk, was a gunshot wound to the chest. (T. 156). Other evidence produced by the State included

evidence of another crime occuring in Alabama, admitted for the limited purpose of showing identity, motive, scheme and purpose of the Petitioner. (T. 79-80). There was testimony that the slug removed from Georgia Morris, the victim in the Alabama crime, was of a similar class and had similar characteristics to the test slug sent by the Georgia Bureau of Investigation from the weapon recovered in the Petitioner's car. (T. 179).

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SUMMARY OF THE ARGUMENT

The tactical decisions of reasonably effective counsel in this case resulted in the intentional decision to forego petitioner's right to file timely challenges to the array of the grand and traverse juries. This intentional decision of counsel to forego the right to file these jury challenges is the antithesis of the type of conduct intended to act as "cause" to excuse a petitioner's procedural default under the cause and prejudice standard.

There is no evidence to support petitioner's speculative claims that there was an "external factor" which operated as "cause" which would excuse petitioner's procedural default. Specifically, there was no "cover up" by state officials of discrimination in the composition of the master jury list, which rendered trial counsel for petitioner "unable" to file a timely challenge to the grand and traverse juries. Instead, the evidence complained of as having been concealed, which allegedly would have supported these jury challeneges, was contained in the public

records and was readily discoverable by trial counsel, had there not been a decision by counsel, based on various significant factors, that no significant advantage would have been obtained by raising any challenege.

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ARGUMENT

COMPETENT TRIAL COUNSELS' STRATEGIC DECISION NOT TO FILE A TIMELY CHALLENGE TO THE ARRAYS OF THE GRAND AND TRAVERSE JURIES RESULTED IN AN INEXCUSABLE PROCEDURAL DEFAULT.

In this case, Petitioner contends that his procedural default in foregoing his right to file timely jury challenges should be excused by what Petitioner asserts was the alleged interference by state officials with the exercise of his constitutional rights. Contrary to Petitioner's pivotal contention, which is founded only on pure speculation, inference and innuendo, there has been no "covert scheme" by state officials to purposefully discriminate in the composition of the master jury list in Putnam County, which was then "covered up" and rendered trial counsel for Petitioner "unable" to file timely jury challenges in compliance with Georgia law.

The actual issue for resolution by this Court is whether there is "cause" to excuse a procedural default which is the result of an intentional, strategic decision by experienced trial counsel based on an awareness of the relevant legal requirements.

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803.[1] It is uncontested that Petitioner failed to challenge the composition of the grand and traverse jury lists at the time of his trial as is required under Georgia law.

The first occasion upon which Petitioner raised his challenge to the composition of the grand and traverse juries was on direct appeal to the Supreme Court of Georgia. The Supreme Court of Georgia declined to review the Petitioner's challenge to the composition of the grand and traverse juries by concluding that the challenge "came too late." *Amadeo v. State*, 243 Ga. 627, 629, 255 S.E.2d 718, 720(4) (1979), *citing*, *Goodwin v. Hopper*, 243 Ga. 193, 253 S.E.2d 156 (1979).

Similarly, in Petitioner's first state habeas corpus proceeding filed in the Superior Court of Putnam County the state habeas corpus court did not consider the jury composition issue on its merits. The state habeas corpus court found that it was precluded from reviewing this issue because the "timeliness" of the challenge had been previously determined adversely to Petitioner by the Supreme Court of Georgia.

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[1] Georgia procedure, as well as federal procedure, recognizes a "cause" exception to this timeliness requirement. *Simmons v. State*, 226 Ga. 110, 172 S.E.2d 680 (1978); *Francis v. Henderson*, 425 U.S. 536 (1976).

A. THE STRATEGIC DECISION TO FOREGO TIMELY JURY CHALLENGE.

At the evidentiary hearing conducted in the federal district court with respect to any alleged "cause" for the procedural default admitted by Petitioner, Petitioner's two trial attorneys testified as to their consideration of making a challenge to the composition of the grand and traverse juries and their strategic reasons for declining to make such a challenge at the time required by Georgia law. Petitioner's analysis of the application of procedural default principles in the context of this case totally ignores trial counsels' testimony. Instead, Petitioner relies on inference and speculation to contend that trial counsel declined to file jury challenges due to "covert interference" by the State.

Mr. William A. Prior, one of the Petitioner's trial attorneys, testified as follows with reference to his explicit consideration of filing a jury challenge on Petitioner's behalf prior to trial:

> We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a list of the jurors and we met with an attorney in Putnam County who had been there for many years, Mr. Dallas Veal. We knew—personally or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse Jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item we decided not to file a challenge. *The reason being that we frankly thought that if we filed it in one, we could wind up in worse shape than we were.* There were certain people on the Jury that we thought that

would be favorable to us on the panel. *So, all things considered, we did consider it and decided not to file.*

(J.A., p. 20) (emphasis supplied).

This decision not to challenge the jury arrays was based on a reasonable, adequate investigation by experienced trial counsel and the weighing of the advantages and disadvantages in filing such challenges. Mr. Prior further testified that they identified each juror on the jury list, prior to trial, as to whether they were black or white and that on the actual traverse list, the persons were approximately evenly divided as to race. (J.A., p. 21). There were either 110 or 120 jurors and the black-white ratio was approximately even, with there being numerous women included on the list. (J.A., p. 21).

Finally, and most tellingly, Mr. Prior testified with reference to the exercise of his strategic decision not to challenge the composition of the juries as follows:

> I do not recall being aware of the exact percentage of the black population of Putnam County and whether the entire Master Jury List would have met that—the requirements of that. Probably not and I probably was aware of that but I guess the point I want to make is that I did consider—*Mr. Lambert and I did consider challenging the array and it was a tactical decision on our part not to challenge the array* because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a Jury List as we could get.

(J.A., p. 22) (emphasis supplied).

Petitioner also ignores the fact that trial counsel believed, based on his legal experience in the eight county judicial circuit including Putnam County, that, if filed, these jury challenges would more than likely be successful. On cross-examination by habeas corpus counsel for Petitioner, Mr. Prior testified that his memory was that in the eight county circuit, including Putnam County in which Petitioner was tried, there had been a challenge to the composition of the Master Jury List. However, Mr. Prior was not certain in which county this challenge had been filed, except that the challenge was not filed in Putnam County. (J.A., pp. 27-28).

With reference to Mr. Prior's knowledge of prior jury challenges to the Putnam County Master Jury List, Mr. Prior testified:

> I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would've been one, if it had been instituted. I can't say that: I *can* say that I had a general knowledge of that area of the state at that time and if you had asked me to guess, I probably would have told you that it would not have met the required percentages but I can't specifically say that: I can't specifically say that I keyed on that or that that was the basis of my decision. *The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were.*

(J.A., pp. 22-23) (emphasis supplied).

Mr. Prior cited various factors which influenced his strategic decision not to timely challenge the composition of the juries:

> There were several factors: I don't think I mentioned the religious factor. There was at that time

> in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "shepard" was in it somewhere, I think, but at any rate, it was very active, had a relatively large following in Putnam County and several of these people had visited the defendant in jail and we knew there were several people on that particular 110 or 120-person panel who were involved in that and that was another reason for thinking we were dong about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

(J.A., p. 23).

Counsel also knew that the prosecutor would be introducing evidence of other crimes from Alabama and Mississippi as part of the crime spree committed by these three white defendants. (J.A., p. 22). Petitioner, who is white, had assaulted black victims in these other states and left them "in pretty bad shape." *Id.* "[W]e were somewhat concerned about black members of the jury or a heavily black jury from that standpoint." *Id.* Thus, the potential lack of sympathy from black jurors because of the other black victims also served to satisfy counsel as to the racial composition of this array.

As already mentioned, another factor influencing the decision not to file a timely jury challenge was the actual make-up of the traverse jury list which Mr. Prior believed to be "favorable" to Petitioner. (J.A., pp. 20:22). With respect to the "memorandum" produced in this case which Petitioner contends was written by the District Attorney's Office to the Jury Commissioners concerning the re-composition of the Master Jury List, Mr. Prior testified:

> I assume you're referring to the memo that played a part in the case of *Bailey v. Vining*, which happened after this trial took place. I do not recall having any knowledge of that memo at that time, although at a later time and prior to the time we instituted the appeal in this case, Mr. Lambert and I represented Mr. Amadeo on the initial appeal to the Georgia Supreme Court, we did become aware of it and did put that as one of our errors in the appeal.

(J.A., p. 24).

With specific reference to why the jury issues were raised on appeal, when they were not raised at trial, Mr. Prior testified:

> At that time, frankly speaking again, we wanted everything we could get in the appeal. We had lost in Mr. Amadeo's case and we wanted to raise every issue we could raise and we did raise that issue on appeal but that probably was the first time I had any knowledge; I certainly do not remember being aware of any memo at the time of this trial.

(J.A., p. 24).

Mr. Prior testified that both he and co-counsel, Mr. E. R. Lambert, participated in writing the appellate brief and both appeared in the Supreme Court of Georgia and argued the case before that court. (J.A., p. 24).

The district court inquired of Mr. Prior, "What was known to you and/or Mr. Lambert and discussed between you all that caused you to consider challenging the jury list for this county?" Mr. Prior replied, "We considered challenging it and we thought we would win if we challenged it." (J.A., p. 28). The district court then asked Mr. Prior what led him to believe that if he challenged the list his challenge would be successful. Mr. Prior replied:

> I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know—I don't think we had any investigation to back that up. I think we just generally thought that and our thinking was, "Well, if we do, we'll gain the benefit of a delay if we win, assuming we win because they'll have to redo the Jury Box and we'll have to draw another Jury and at least we'll get a delay." On the other hand, we had already been through these jurors that we had one at a time and we knew or we thought we knew what we had there and we balanced those two factors and decided not to.

(J.A., p. 28).

Co-counsel for Petitioner at trial, Mr. E. R. Lambert, also recalled receiving advice from Mr. Dallas Veal and examining the names on the Traverse Jury List, determining what jobs people had, what race the people were and other significant factors. (J.A., pp. 30;35). As to Mr. Lambert's opinion as to whether the jury list was composed in a beneficial manner, Mr. Lambert testified:

> Well, we knew we had a tough case but we felt very comfortable with the Jury after reviewing with Mr. Veal some people we felt was, you know, would not be so wanting to give the death penalty.

(J.A., p. 35).

Mr. Lambert reiterated that he felt "very comfortable with this Jury. It was about—my recollection it was six blacks and six whites and probably more female than males". (J.A., p. 39). Mr. Lambert testified that his recollection was that the jury that actually served was six black persons and six white persons and either eight or nine women and three or four men. (J.A., p. 40).

Evidence was produced that Mr. R. W. Dennis, Sr., Clerk of the Superior Court of Putnam County, provided to Mr. Christopher Coates, an attorney seeking information on the voting procedures in Putnam County and the composition of the Master Jury List for Putnam County, a copy of a memorandum that purportedly was from the office of the district attorney and purportedly provided to the Jury Commissioners for purposes of reconstituting the jury list. (J.A., pp. 9; 41). The memorandum (J.A., p. 2) was provided to Mr. Coates in 1978. Mr. Coates testified:

> I went to the Clerk's Office and asked Mr. Dennis, who's the clerk of court in Putnam County, to provide me with as many jury lists as he could and when I say, "jury lists" I mean the Master List for both the Grand and Traverse Jury. What I was interested in doing is looking historically at whether or not blacks had been under-represented in Putnam County on the Jury List and then if I found such evidence, I would use that evidence in the *Bailey v. Vining* case as a piece of historical race discrimination evidence. *And Mr. Dennis made these documents available and I perused them.*

(J.A., p. 42) (emphasis supplied).

The memorandum in question was found by Mr. Coates in making his study of the Master or Grand and Traverse Jury List in Putnam County. (J.A., p. 44). Mr. Coates testified concerning the location of the memorandum by stating:

> I don't recall whether or not it was a book or whether it was loose-leaf pages but I do remember this memor-

andum, I found this memorandum and those materials. It was—I do—I recall that it was not on the first page of the book and it was not on the first page of the material that I was perusing but somewhere *within the stack of materials that Mr. Dennis gave me* this document appeared.

(J.A., p. 44) (emphasis supplied).

Both Mr. Prior and Mr. Lambert testified that they had no knowledge of any such "memorandum," essentially a list referencing certain target figures for the jury commissioners, or the circumstances under which it originated or the effect it was intended to have. (J.A., p. 24). Mr. Lambert testified that he did not know anything about the list until after *Bailey v. Vining* was tried in Putnam County. (J.A., p. 37). Mr. Prior testified that he raised the subject of the memorandum as an attempt to obtain review from the Supreme Court of Georgia concerning the jury issue because, "At that time, you know, the trial was over and we were searching for straws and doing everything we could to try to follow through." (J.A., p. 33).

Therefore, it can readily be seen that trial counsel for Petitioner made a strategic decision prior to trial not to challenge the array of the grand and traverse juries, even though counsel was aware that Georgia law required that to be timely, juries must be challenged at, or before, the time that a jury is put upon a defendant. Trial counsel testified that they made a strategic decision not to challenge the array of the grand and traverse juries. The decision was made by balancing the various factors involved, including the fact that at most, a successful challenge to the arrays would give them additional time prior to Petitioner's trial, but might result in them losing the favorable balance they found to exist on the jury lists which they had obtained, which lists they had perused with the help of experienced local counsel.

Trial counsels' testimony was that they were specifically aware that the arrays of the grand and traverse jury might have been susceptible to challenge, in that they were aware that another county in the circuit had its Master Jury List successfully challenged. Mr. Lambert even testified that he was specifically aware of the decisions of this Court in such cases as *Whitus v. Georgia*, 385 U.S. 545 (1967), with reference to jury composition matters and he was aware that the jury box in the Superior Court of Bibb County, Georgia, had been found to be unconstitutional by this Court. (J.A., pp. 38-39).

It was only after trial, when the alleged list submitted to the jury commissioners was discovered by other counsel in the public records kept in the Clerk's office of the Superior Court of Putnam County, that Petitioner's attorneys attempted to raise the jury issue on its merits, because at that time they "wanted everything we could get in the appeal" (J.A., p. 24), as they were "reaching for straws." (J.A., p. 33).

The attorneys knew that the jury arrays were arguably susceptible to challenge and that any challenge would probably be successful. (J.A., p. 28). Therefore, the existence of the list of target figures was irrelevant as the attorneys' decision was based on sound reasoning, including the favorable nature of the array and the fact that even a successful jury challenge, which the attorneys believed they could mount, would only bring about a delay in Petitioner's trial. *See Francois v. Wainwright*, 741 F.2d 1275, 1283 (11th Cir. 1984).

B. TACTICAL DECISIONS ARE THE ANTITHESIS OF "CAUSE."

Pursuant to this Court's decision in *Reed v. Ross*, 468 U.S. 1 (1984), it is clear that a tactical decision to forego a procedural opportunity cannot qualify as "cause" within the meaning of *Wainwright v. Sykes*, 433 U.S. 72 (1977), so as to allow a federal habeas corpus court to review procedurally defaulted claims on their merits. *Reed v. Ross*, *supra*, at 14, as cited in *Amadeo v. Kemp*, 816 F.2d 1502, 1505-1506 (11th Cir. 1987). In *Reed v. Ross*, *supra*, this Court held that:

> Underlying the concept of the cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel . . . and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. (cites omitted).

Reed v. Ross, supra, at 13.

This Court also stated that an attorney "may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court." *Id.* This Court concluded, in language particularly applicable to this case, that:

> In general, therefore, defense counsel may not make a tactical decision to forego a procedural opportunity —for instance, an opportunity to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal courts.

Id.

Essentially, this is what occurred in the instant case, as reasonably competent and experienced trial counsel for Petitioner made a strategic determination under the totality of the circumstances to forego their chance to file a timely challenge to the arrays of the grand and traverse juries. As noted above, this decision was made based upon a reasonable investigation of the jury venire itself, with the knowledge of the applicable law concerning jury discrimination cases, with an understanding that the jury challenges would be waived by the failure to file a timely challenge and with the understanding that any jury challenge filed might have been successful only in the limited sense that Petitioner's trial would be delayed.

This Court in *Reed v. Ross*, *supra*, citing its earlier decision in *Estelle v. Williams*, 425 U.S. 501, 513 (1976), concluded that procedural default based on tactical decisions by defense counsel are "inexcusable," and cannot qualify as "cause" for purposes of federal habeas corpus review. *Reed v. Ross*, *supra*, 468 U.S. at 14. Petitioner's intentional procedural default is therefore inexcusable under the facts outlined above.

The Eleventh Circuit also concluded that Petitioner's attorneys' strategic decision not to challenge the arrays of the juries did not constitute sufficient cause to excuse Petitioner's procedural default. The Eleventh Circuit found as follows:

> The memorandum detailing the county's efforts to alter the racial composition of the Master Jury List was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. How-

> ever, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury list and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

Amadeo v. Kemp, supra at 1507.

These facts cited above and found to be significant by the Eleventh Circuit are ignored by Petitioner and argued to be facts which are "clearly erroneous." Petitioner argues that the Eleventh Circuit misapplied the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a), so as to require reversal of the Eleventh Circuit's decision denying Petitioner federal habeas corpus relief. This Court has repeatedly stated, however, that its function is not to correct errors in fact finding "in the absence of a very obvious and exceptional showing of error." *Graves Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Petitioner's attempt to substitute his version of the facts for the Eleventh Circuit's findings is not such an "exceptional showing."

Contrary to Petitioner's assertions, there is no evidence that Petitioner's trial attorneys declined to challenge the composition of the juries due to the "governmental deception" and "covert interference" by the government with the Petitioner's exercise of his constitutional rights. It was as the result of a state official, i.e., the Clerk of the Superior Court of Putnam County, that counsel in another case became aware of the memorandum. The discovery of the memorandum was in

close proximity in time to Petitioner's trial and was readily discoverable in the public records of Putnam County as the document accompanied the Master Jury List. (J.A., pp. 42;44). There was no "cover up" or "concealment."

Petitioner has repeatedly alleged, but has never proven, that the "state deliberately concealed evidence of unconstitutional conduct." The fact that the list of target figures allegedly authored by the district attorney and allegedly submitted to the jury commissioners by him, might have supported a challenge to the juries does not negate the fact that there was a tactical decision made to forego the right to a jury challenge. Petitioner has cavalierly utilized inference, speculation and innuendo to suggest that there was a "cover up" of the memorandum and that the purpose of the memorandum was to intentionally discriminate in the composition of the Master Jury List.

An examination of the memorandum, which appears at page 2 of the Joint Appendix, establishes that the memorandum is far from clear on its face and Petitioner produced no evidence at the federal habeas corpus evidentiary hearing as to the actual author of the memorandum, the purpose of the memorandum or to whom the memorandum was submitted. Rather, the clerk of the court testified in the *Bailey v. Vining* case, not Petitioner's case, that the memo was received from the solicitor's office (J.A., p. 10) and that the clerk turned the "list" over to the chairman of the jury commission at the time the jury list was reconstituted. (J.A., p. 9). It also should be apparent that, contrary to Petitioner's assertions, the memorandum or list was not found in a mass of documents, by chance, but, instead, was a document maintained with the official Master

Jury List and produced by the Clerk of the Superior Court in response to the request of an attorney seeking to mount a challenge to the array of the Master List and its composition. (J.A., pp. 42; 44-45).

Mr. Coates, the attorney who was provided the list by the clerk, inferred that this was a memorandum in which someone had tried to tell the jury commissioners of Putnam County how to "try to remedy the challenge to their juries, add some blacks and some women, continue to underrepresent significantly those groups while at the same time arguably coming within the *Swain v. Alabama* case." (J.A., p. 46). However, this unfounded and inflammatory speculation made by Mr. Coates concerning the list provided to him by Mr. Dennis has never been supported, since no one from the district attorney's office was called to testify as to the authorship of the memorandum or purpose of its creation. Even Mr. Coates stated that it was his "theory" that the list indicated an intent to continue to underrepresent black persons and that this theory was presented to the court in the *Bailey v. Vining* case and to the same district judge who ultimately found "cause" to excuse Petitioner's procedural default in this case. (J.A., pp. 46-47).

Respondent submits that the equitable nature of habeas corpus relief to which Petitioner makes reference still does not permit "cause" to be established simply by alleging, and not proving, that the government acted improperly in allegedly directing jury commissioners to attempt to obtain specific percentages in the racial composition of the Master Jury List. At the most, Respondent submits that the list allegedly directed to the jury commissioners of Putnam County suggested target figures for the jury commissioners to utilize in attempting to obtain a more representative jury when the list was ordered reconstituted in 1977.

With specific reference to need to make timely jury challenges, this Court in *Francis v. Henderson*, 425 U.S. 536 (1976), approved the requirement of the states to insure prompt assertions of claims concerning the make-up of juries. *Id.* at 541. Citing the previous decision of this Court in *Michel v. Louisiana*, 350 U.S. 91 (1955), this Court held that:

> It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury.

Id. at 97.

Therefore, the procedural rule such as that in force in the State of Georgia with respect to challenges to jury composition is the type of rule this Court and others have seen as properly containing reasonable time limitations for asserting such rights. As this Court noted, there is a need for a prompt determination of preliminary matters such as the composition of the juries. *Id.*

In *Wainwright v. Sykes, supra*, this Court noted that the failure to require compliance with a contemporaneous objection rule detracts from the perception of the trial of the criminal case in state court as being a "decisive and portentous event." *Id.* at 90. This Court stressed in *Wainwright v. Sykes, supra*, that "if a criminal defendant

thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection." *Id.*

There is ample precedent by this Court that time limitations for assertions concerning alleged defects in the make-up of the grand and traverse jury are appropriate in order to insure the integrity of the trial as the "main event" and in order to insure the prompt resolution of preliminary matters before the presentation of evidence begins.

Strong policy considerations underlie the application of the procedural default rule where, as here, there is a strategic decision by competent counsel with reference to matters preliminary to the actual trial itself. This Court so stated in *Francis v. Henderson, supra, citing, Davis v. United States,* 411 U.S. 233, 241 (1973).

Contrary to Petitioner's claims, the costs of failing to find a procedural default when there has been an intentional, strategic failure to object, in this instance to the array of the grand and traverse juries, are very high. This Court discussed the costs of federal habeas corpus review in the context of a state procedural default in *Murray v. Carrier,* — U.S. —, 106 S.Ct. 2639 (1986). This Court stated the following:

> Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court

> of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and "extracts an extra charge by undercutting the State's ability to enforce its procedural rules."

Murray v. Carrier, supra, at 2645, quoting *Engle v. Isaac,* 456 U.S. 107, 128-29 (1982).

C. NO EXTERNAL FACTOR EXISTS TO EXCUSE PETITIONER'S PROCEDURAL DEFAULT.

Petitioners appears to argue that the alleged concealment of the memorandum from Amadeo's counsel was an external factor which made compliance with the procedural default rule "impractical." Therefore, Petitioner argues that there was "cause" under the *Wainwright v. Sykes* standard. Respondent respectfully submits that regardless of the actions of state officials, including the alleged actions of the district attorney with reference to the jury commissioners, competent counsel made an informed, reasonable decision to forego a challenge to the arrays of the juries at trial. Then, after the case was on appeal, counsel determined that they should raise this issue based on the memorandum since they had lost and were "reaching for straws." (J.A., p. 33). It also appears that state officials, specifically the Clerk of the Superior Court of Putnam County, did not interfere with Mr. Coates' attempt to present this claim in another context, but in fact assisted him in obtaining information. Not only did the Clerk not "interfere" but he produced the memorandum from the Master Jury List documents at Mr. Coates' request. (J.A., p. 44). Petitioner has consistently claimed that there was intentional concealment by the

county officials and that this alleged "misconduct" should not be rewarded. Respondent respectfully submits that a review of the testimony of Petitioner's trial attorneys and the testimony of Mr. Dennis, the Clerk of the Superior Court of Putnam County, shows that there was no "intentional concealment" by the state. As the Eleventh Circuit found, these documents were "readily discoverable" in the county public records. *Amadeo v. Kemp, supra* at 1507.

Additionally, Respondent submits that simply because there was no "sandbagging" by Petitioner's attorneys in this case, i.e., there was no attempt to withhold meritorious claims for presentation at a later time, does not mean that the policies of *Wainwright v. Sykes, supra,* should not apply in this factual context. Instead, as extensively discussed above, it is clear that the cause and prejudice standard was never designed with the intent to excuse procedural defaults based on deliberate and informed, strategic decisions. *Reed v. Ross,* 468 U.S. 1, 13-14 (1984). Clearly the principles of comity and finality require there to be no finding of "cause" where there has been the exercise of intentional, strategic bypass of orderly state procedures. See *Engle v. Isaac,* 456 U.S. 107, 135 (1982).

The factual premises for Petitioner's position are unfounded. Specifically, Petitioner ignores the testimony of his trial attorneys when he contends that he was "unable" to challenge the composition of the grand and traverse juries due to the alleged concealment of the memorandum, which was a public document, from his attorneys. Respondent respectfully submits that this was not a question of "inability" to raise a claim. This, rather, was a

considered decision to forego such a claim at the appropriate time and a subsequent decision to raise the claim at a later point only after the strategy to avoid the imposition of the death sentence had failed. Therefore, this is not a case which involves the "inability" to raise a claim, but rather involves the weighing of the efficacy of filing such a claim in light of the totality of the circumstances known to Petitioner's counsel prior to his trial. Therefore, based on the evidence cited above, the failure to file the claim was not, as a causal matter, due to any factual basis for the claim being "concealed" by the state. Respondent specifically does not concede that there was any discriminatory scheme or concealment by the State which operated so as to interfere with Petitioner's ability to present the claim. Petitioner had a factual and legal basis for making such a claim, but simply chose not to do so. *Compare Murray v. Carrier, supra* at 2646.

In short, there was no cause and effect between the failure to know of the existence of the memorandum prior to Petitioner's trial and the attorneys' strategic decision not to file a challenge, even though it was believed that such a challenge would be successful but would simply result in a delay of the proceedings against the Petitioner.

With specific reference to Petitioner's failure to challenge the grand jury, as opposed to the traverse jury (the array of which Petitioner's attorneys believed to be favorable to Petitioner), Respondent notes that in *Reece v. Georgia,* 350 U.S. 85 (1955), this Court accepted the validity of the Georgia rule requiring that challenges to the grand jury be made prior to indictment.

In two recent Eleventh Circuit cases, that Court has correctly determined that no showing of prejudice could be

made to excuse the failure to file a timely grand jury challenge because "a successful grand jury challenge would have served only to delay the date of trial." *Francois v. Wainwright*, 741 F.2d 1275 (11th Cir. 1984), and *Godfrey v. Kemp*, No. 85-8570 (11th Cir. Jan. 20, 1988). In *Godfrey v. Kemp*, the Eleventh Circuit found that "in this case there is little doubt that had Godfrey's original indictment been quashed he would have been reindicted." *Godfrey v. Kemp, supra*, slip op. at p. 23. In holding that the two petitioners in those cases had not met the prejudice prong of the cause and prejudice requirement, the Eleventh Circuit noted that it was aware of this Court's recent decision in *Vasquez v. Hillery*, 474 U.S. 254, (1986). The Eleventh Circuit held as follows:

> There [in *Vasquez v. Hillery, supra*] the Supreme Court held that once a prisoner demonstrates that he was indicted by an unconstitutionally composed grand jury he is entitled to have his conviction reversed automatically. The Court acknowledged that this decision was merely an affirmation of its decision six years earlier in *Rose v. Mitchell*, 443 U.S. 545 (1979) . . . In *Francois* we rejected the argument that Mitchell's automatic reversal rule set aside the prejudice requirement of *Francis*. We reasoned that because *Mitchell* expressly distinguished itself from *Francis* on the ground that the petitioners in *Mitchell* did not procedurally default on their grand jury claims, the decision in *Mitchell* did not call into question *Francis's* requirement of a showing of actual prejudice. Because the petitioners in *Vasquez* also did not procedurally default on their claim, we see nothing in that opinion that suggests it has altered our reasoning in *Francois*.

Godfrey v. Kemp, supra, slip op. at p. 23-24, n. 12.

Similarly, in this case, there is no "cause" for excusing the procedural default committed by Petitioner with reference to the grand jury claims. Respondent further submits there is no showing of prejudice with respect to the grand jury, nor can Petitioner establish cause simply based on a contention that a grand jury challenge in this case might have been successful, succeeding only in delaying the date of Petitioner's trial. Compare *Smith v. Murray*, — U.S. —, 106 S.Ct. 2661, 2666-2667 (1986).

Based on the above and foregoing, it is clear that there was no "external factor" or "interference by state officials" which impeded competent trial counsel's ability to file timely grand and traverse jury challenges, as postulated by this Court as a possible scenario which would demonstrate "cause" so as to excuse a state procedural default. Rather, Respondent respectfully submits that the facts of this case place it squarely within the purview of *Wainwright v. Sykes, supra*, and its progeny. These cases stand for the proposition that reasonable, intentional, strategic decision. made by competent trial counsel are the antithesis of the type of circumstance which can constitute "cause" to excuse a state prisoner's procedural default, especially where the state procedure is, as here, a procedure of long-standing and which has been constitutionally approved.

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CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should affirm the convictions and sentences imposed by the state of Georgia with reference to Petitioner and that this Court should affirm the decision of the Eleventh Circuit Court of Appeals declining to review Petitioner's jury challenges on their merits due to the absence of cause for excusing Petitioner's state procedural default.

Respectfully submitted,

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No. 87-5277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

VS.

RALPH KEMP, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 87-5277

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TONY B. AMADEO,

Petitioner,

vs.

RALPH KEMP, WARDEN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was

* Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving racial injustices.

The Fund has a longstanding concern with the issue of the exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in appeals from criminal convictions[1] and pioneered in the affirmative use of civil

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[1] E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

actions to end discriminatory practices.[2]

SUMMARY OF ARGUMENT

The prosecutor's involvement in a clandestine scheme to violate the Constitution and conceal the violation disentitles him from invoking the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) to block federal adjudication of the unconstitutional scheme.

ARGUMENT

THE CONSTITUTION AND LAWS OF THE UNITED STATES REQUIRE THAT PETITIONER'S CONVICTION BE VACATED

When officials of the State of Georgia intentionally manipulated the selection of jurors in Putnam County in order to limit the number of Black citizens selected to the smallest number possible, and did so in a manner

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[2] Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

specifically designed to conceal the fact that such a scheme was in force, their actions were a direct affront to all Black citizens of this country. When the district attorney obstructed the presentation to state courts of any challenge to this scheme, by cloaking it over, and when he now seeks to foreclose a challenge to the scheme in federal court by invoking the principle of comity embodied in Wainwright v. Sykes, 433 U.S. 72 (1977), he adds insult to injury. Such venality should estop a prosecutor from invoking an equitable principle that is based on the assumption that state officials are conducting their affairs in an honest and lawful manner.

Section 243 of Title 18 of the United States Code provides, in part:

> [W]hoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or

> fails to summon any citizen [on account of race, color, or previous condition of servitude], shall be fined not more than $5,000.

Petitioner Amadeo was indicted, convicted, and sentenced to death by juries selected pursuant to a conspiracy to violate § 243. This conspiracy was so successful that it was not discovered until after petitioner's trial, and then only through a fortuity. The question before this Court, therefore, is whether the State of Georgia can rely on the success of a criminal conspiracy by prosecuting officials to bar federal court review of a conviction and death sentence that are the fruits of that very conspiracy.

Amicus strongly urges that there is nothing in the decisions of this Court or in any legitimate rules of comity or forfeiture that should allow the state to profit from its unlawful and patently

racist actions. It has been a criminal offense under the laws of the United States to exclude or fail to summon jurors because of their race since 1875. See Ex parte Virginia, 100 U.S. 339 (1880). The actions of the district attorney and the jury commissioners in Putnam County, Georgia in 1977 were, as demonstrated by the uncontroverted facts, deliberate and intentional violations of the Constitution and laws of this land, so clearly deliberate and intentional as to amount to criminal conduct.[3]

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[3] The history of the statutory and decisional law prohibiting jury discrimination (see infra), and the circumstances of the plot revealed by the record and found established by the district court below, make it plain that the Putnam County officials knew exactly what they were doing and were motivated by the many jury discrimination cases brought in Georgia at the time, including one in neighboring Taliaferro County. Turner v. Fouche, 396 U.S. 346 (1970). See also, e.g., Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971); Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977).

Indeed, the very purpose of the conspiracy was to avert a judicial ruling that the juries in Putnam County were unconstitutional by deliberately excluding just enough Black citizens to prevent a finding of discrimination based on statistics. Nevertheless, as this Court has made clear in such cases as Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 79, n. 3 (1986), and Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972), the intentional exclusion of any number of Blacks from a jury because of their race violates both the Constitution and 18 U.S.C. § 243.

The findings of the district court, which are binding unless clearly erroneous, establish that as soon as the petitioner learned of the criminal acts of

the Putnam County officials he attempted to raise his claim of unconstitutional and illegal jury discrimination in the Georgia courts. The district court further found that it would not have been possible to have uncovered the conspiracy before trial because of its deliberately covert nature. Given these clear facts and the undoubted command of the law, it is difficult to conceive of any countervailing equitable principles that should result in Georgia's obtaining an advantage because of the criminal actions of its officials.

Petitioner argues that the conduct of his counsel cannot be faulted, and that the clear presence of both "cause" and "prejudice" place this case within the established exception to the Sykes waiver rule. Petitioner's argument is clearly correct, but Amicus believes it is inappropriate to allow the state to invoke

the Sykes analysis at all. Sykes is grounded in the state's legitimate interest in an orderly and rule-bound judicial process. It is also a reflection of a policy intended to promote respect for state court enforcement of federal constitutional rights. Where a prosecuting authority intentionally schemes to keep his own and other state officials' unconstitutional acts from coming under the scrutiny of orderly judicial processes by forestalling their discovery and adjudication in the state -- or any other -- court system, the prosecutor should no more be permitted to pervert the legitimate shield of Sykes into a sword for waging war against the Constitution than a criminal defendant may identically pervert procedural protections created to preserve his or her Fourth, Fifth and Sixth Amendment interests. See United

States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971). Technical analysis of the "cause" and "prejudice" elements of Sykes is hardly necessary to deny its availability for manipulation by a prosecutor in this fashion.

This case is but the latest in a long series of examples, stretching back to 1880, of the refusal of state officials to recognize the right of Blacks to be free of racial discrimination in the selection of juries and the right of all defendants to be tried by a criminal justice system untainted by racism.[4] To permit the

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4 See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Norris v. Alabama, 294 U.S. 587 (1935); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Carter v. Jury Commission, 396 U.S. 320 (1970) (Alabama); Turner v. Fouche, 396 U.S. 346 (1970) (Georgia); Alexander v. Louisiana, 405 U.S. 625 (1972); Peters v. Kiff, 407 U.S. 493 (1972) (Georgia); Rose v. Mitchell, 443 U.S. 545 (1979) (Tennessee); Vasquez v. Hillery, 474 U.S. 254 (1986) (California); Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986).

indictment, conviction, and death sentence to stand would simply encourage other state officials to embark on similar criminal conspiracies, but to conceal them more effectively in the hope that they also would not be discovered until after a trial has been held. If, on the other hand, this Court reverses the court of appeals and orders petitioner to be retried by a jury constituted in accord with the Constitution and laws of the United States, it will do no more or less

than underline once again the vital message that this most pernicious form of racial discrimination will not be tolerated.

CONCLUSION

The decision of the court below should be reversed.

Dated: December 14, 1987.

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